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N. 9879

No. 13862

# United States
# Court of Appeals
## for the Ninth Circuit

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NELSE MORTENSEN & CO., INC.,

Appellant,

vs.

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a Corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN,

Appellees.

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# Transcript of Record

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**Appeal from the United States District Court for the Western District of Washington, Northern Division.**



Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-5-54

No. 13862

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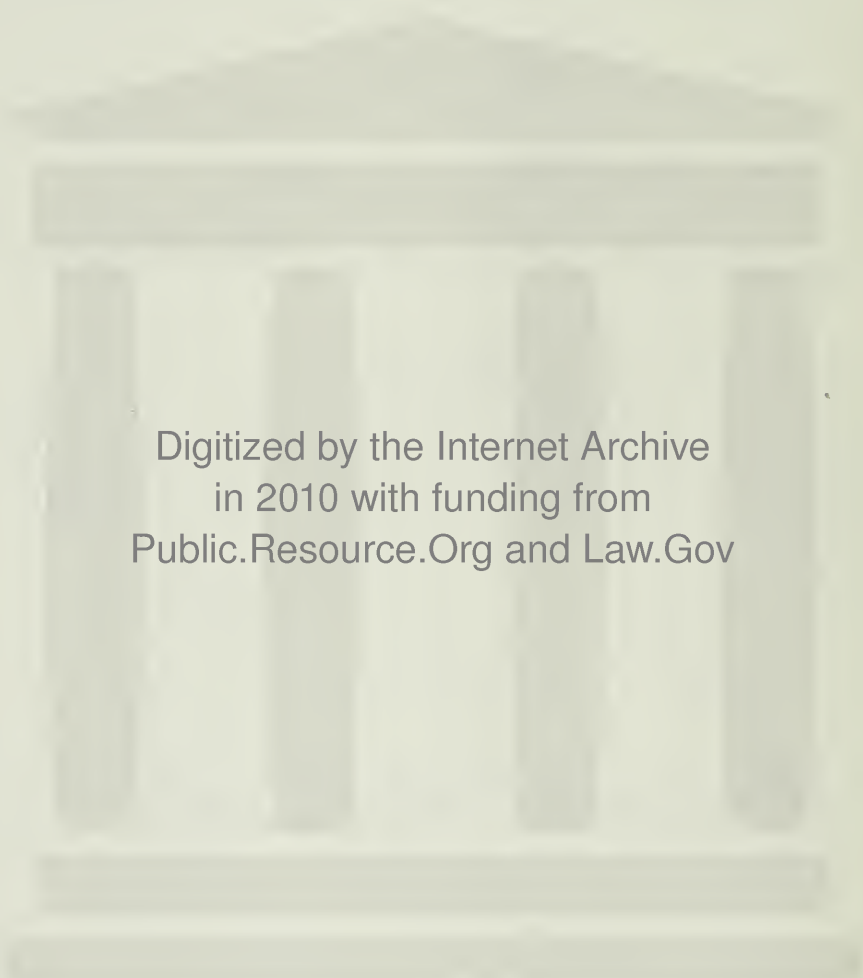

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Attorneys for Puget Sound Prod. Co.,
610 Colman Building,
Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 38838

In Proceedings for the Reorganization of a Corporation

In the Matter of

PUGET SOUND PRODUCTS Co., a Corporation.

To the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, Northern Division:

## PETITION FOR RELIEF

Comes now, Puget Sound Products Co., a corporation, and respectfully represents to this Honorable Court as follows:

I.

That your petitioner is a corporation organized and existing under the laws of the State of Washington, and is a corporation which could become a bankrupt under the Act of Congress relative to Bankruptcy, (52 Stat. 840) and is not a municipal, insurance, or banking corporation, or a building and loan association, or a railroad corporation authorized to file a petition under Section 77 of said act.

II.

That your petitioner now has, and for the six (6) months next preceding the filing of this petition,

has had its principal place of business at 610 Colman Building, Seattle, King County, Washington, together with other places of business in Houghton, King County, Washington, and also at 2006 Smith Tower, Seattle, King County, Washington, all within the territorial jurisdiction of this Court.

III.

That your petitioner is unable to pay its debts as they mature.

IV.

That the nature of the business of your petitioner is the manufacture, sale and distribution of a new product known as Gossite, which is a specially compressed product made of wood waste or materials, which is used for kitchen counter-tops, wall and ceiling sheathing, and for general construction, the uses of which have not been fully ascertained because of the relative newness to the market, of the product.

V.

That the assets, liabilities, capital stock, and financial condition of your petitioner as of July 31, 1950, are as follows:

(a) The assets of your petitioner consist of a leasehold interest in certain land and buildings in Houghton, Washington, together with a substantial investment in machinery and equipment for the special purpose of making Gossite, together with necessary tools, a truck, office furniture and equipment, accounts receivable, inventory on hand and certain deposits together with other miscellaneous

assets valued at $327,686.47. That said figure does not include the royalty-free license which is valued by the corporation at $250,000.

(b) The liabilities of your petitioner, exclusive of its capital stock and unpaid dividends, as of July 31, 1950, are in the total sum of $187,488.98.

(c) The issued capital stock of your petitioner, is in the sum of $894,414.00.

(d) The financial condition of your petitioner is fully set forth in the Balance Sheet dated as of July 31, 1950, which is marked Exhibit "A" and is annexed hereto and is hereby made a part of this petition, and the condition of your petitioner is now substantially the same as it was at the date of said Balance Sheet except for the deletion of the assets denoted Land and Buildings, in the total value of $74,532.23 prior to depreciation allowance. This figure, of course, should be reflected in the liability side of the ledger but which has not been done to date because of restricted finances.

VI.

That there are the following proceedings affecting the property of your petitioner as known, to wit:

(a) Seattle Association of Credit Men, Trustee, vs. Puget Sound Products Co., Cause No. 425684, in Superior Court of the State of Washington for King County, Application for appointment of receiver.

(b) Pacific Car and Foundry Company vs.

Puget Sound Products Co., et al., Cause No. 423110 in Superior Court of the State of Washington for King County, Foreclosure Judgment on Chattel Mortgage in total sum of $14,125.36 together with interest, attorney's fees and costs, together with certain lien interest rights of the United States Dept. of Labor and Industries, State of Washington, and Employment Security Department of the State of Washington.

(c) Action by one Louis Gendelman vs. Puget Sound Products Co., for the recovery of $4,166.67.

VII.

That no plan of reorganization, readjustment or liquidation affecting the property of your petitioner is pending either in connection with or without any judicial proceedings, except as stated in Paragraph VI above and Paragraph VIII hereof.

VIII.

That the specifie facts showing the need for relief under Chapter X of said Act are as follows: Your petitioner's assets are of a value in excess of its total liabilities, exclusive of its capital stock, but the nature of its assets is such that their true value is not readily realizable; that a forced sale of said assets would bring substantially less than its total liabilities, exclusive of capital stock; that your petitioner's financial situation is such that insistence by its creditors upon payment of their past due claims would lead to recovery of judgments against it, the levy of executions against its inventories and ma-

terials, supplies and accessories, and piecemeal destruction of its business and property, inevitably resulting in substantial loss to creditors and complete destruction of the rights of stockholders. That the adoption of a suitable plan of reorganization under the said Act will protect the creditors of your petitioner and will reduce the loss to its stockholders which would otherwise result from the enforcement of creditors' claims and consequent destruction of your petitioner's business and the values of its properties. That it is essential for the protection of creditors and stockholders that the commencement of suits and the sale of the assets against your petitioner be stayed pending final decree of this proceeding. That the holders of all the capital stock of the Company have approved this petition and feel confident that a plan of reoranization can be developed and effected so as to provide for the payment of all costs of administration in this proceeding and other allowances made by the Court herein, the liquidation of all of petitioner's indebtedness and the preservation of the equities and rights of stockholders, thereby averting partial loss to its creditors and total loss to its stockholders.

IX.

That the specific facts showing why adequate relief cannot be obtained under Chapter XI of said Act are as follows: That your petitioner cannot be reorganized with reasonable prospect of success in the continued operation of its business merely by

an arrangement with its unsecured creditors. That new capital is needed by your petitioner and can only be obtained by a recasting of present stock interests and an alteration or modification of the rights of unsecured creditors as part of a single plan of reorganization.

X.

That your petitioner desires that a plan of reorganization be effected for it under and pursuant to Chapter X of said Act.

XI.

That the indebtedness of your petitioner, liquidated as to amount and not contingent as to liability, is under $250,000.00.

XII.

That no other petition by or against your petitioner is pending under Chapter X of said Act, nor is any other bankruptcy proceeding initiated by a petition by or against your petitioner, now pending.

Wherefore, your petitioner prays:

(a) That an Order be entered herein approving this petition;

(b) That your debtor corporation be authorized to retain possession of the properties of the petitioner.

(c) That your debtor corporation be authorized, directed and empowered to manage the property of your petitioner; and

(d) That further proceedings may be had upon this petition in accordance with the provisions of Chapter X of said Act and that your petitioner have such other and further relief, as may be just and equitable in the premises.

PUGET SOUND PRODUCTS CO.

By /s/ O. P. M. GOSS,
President; For Petitioner.

Presented by:

KENNETH J. SELANDER AND GEORGE T. NICKELL.

Puget Sound Products Co.
Balance Sheet
July 31, 1950

| | | | |
|---|---|---|---|
| Assets: | | | |
| Accounts receivable (less allowance for doubtful accounts) | | | 513.38 |
| Inventories (estimated) | | | 5,000.00 |
| Deposits | | | 996.00 |
| Plant and equipment (at depreciated cost) | | | |
| Land | | 11,672.92* | |
| Buildings | 62,859.31* | | |
| Machinery and equipment | 402,140.01 | | |
| Tools | 3,142.16 | | |
| Truck | 1,020.00 | | |
| Office furniture & equip. | 1,004.19 | | |
| | 470,165.79 | | |
| Less reserve for depreciation | 86,129.39 | 384,036.40 | 395,709.32 |
| Royalty-free License (at the par value of stock issued therefor) | | | 250,000.00 |
| Development expense | | | 394,465.47 |
| Organization expense | | | 77,756.51 |
| | | | 1,124,440.68 |

| | | |
|---|---|---|
| Liabilities: | | |
| Current Liabilities | | |
| Bank Overdraft | | 272.40 |
| Accounts and notes payable—secured | | |
| Seattle Association of Credit Men, Trustee | 68,240.01 | |
| Pacific Car & Foundry Co. | 14,125.36 | |
| Harold Curry | 5,000.00 | |
| War Assets Administration—Current and past due installments | 11,508.48* | |
| Account payable—WAA | 4,176.10* | |
| Accrued interest on secured notes and accounts payable | 7,696.02 | 110,745.97 |
| Accounts payable | | 29,985.98 |
| Unsecured loans and notes payable, including accrued interest | | 5,431.00 |
| Deposits | | 1,020.50 |
| Payroll payable | | 11,013.51 |
| Taxes payable | | 19,487.07 |
| Account payable—United States Sheetwood Co. | | 25,217.13 |
| Long-term Liabilities | | 203,173.56 |
| Installment notes payable to War Assets Administration | 38,361.60* | |
| Less installments included in current liabilities above | 11,508.48 | 26,853.12 |
| Capital Stock | | 230,026.68 |
| Voting common: authorized, 900,000 shares, par value, $1.00; issued and outstanding, 600,525 shares | 600,525.00 | |
| Non-voting common (Class A). authorized 300,000 shares, par value, $1.00: Issued and outstanding, 293,889 shares | 293,889.00 | 894,414.00 |
| | | 1,124,440.00 |

*The land and buildings have been retaken by WAA. These items should be adjusted accordingly in statement.

Duly verified.

[Endorsed]: Filed February 2, 1951.

[Title of District Court and Cause.]

## ORDER APPROVING DEBTOR'S PETITION UNDER CHAPTER X OF BANKRUPTCY ACT

This Matter having come on for hearing before me, the undersigned Judge of the above-entitled Court this 3rd day of February, 1951, at 10:00 o'clock a.m., upon the petition of the above-named Debtor, for reorganization under Chapter X of the Bankruptcy Act, the said petition having first come on for hearing February 2nd, 1951, and having been continued until said later date, above written, and it appearing that no notice of said petition should be given and said debtor and petitioner appearing by and through D. P. M. Goss, the President of said debtor, and Kenneth J. Selander and George T. Nickell, Attorneys-at-law, and Benjamin F. Berry, L. D. Kelsey, Jr., and Henry James appearing in behalf of minority stockholders of the petitioner, and Burroughs Anderson, being present representing Harbor Plywood Corporation, an unsecured creditor, and Paul Fetterman and William E. Clancy, Jr., both of the law firm of Helsell, Paul & Fetterman, representing Pacific Car & Foundry Co., a secured creditor, who appeared and indicated to the court that it might later contest said petition as not having been filed in good faith, and the Court having permitted said statement to be made for the record, and no one else in any way appearing herein, and counsel having been heard, and the

Court being fully advised in the premises; does now hereby find, order, adjudge and decree as follows, to wit:

1. That the indebtedness of Puget Sound Products Co., the above-named debtor, liquidated as to amount and not contingent as to liability, is less than $250,000.00.

2. That the said petition of Puget Sound Products Co., said debtor, verified the 2nd day of February, 1951, complies with the requirements of Chapter X of the Act of Congress relating to bankruptcy;

3. That the said petition of Puget Sound Products Co., a corporation, said debtor, has been filed in good faith;

4. That said petition be, and the same is hereby approved;

5. That pending the further order of the Judge, said debtor be, and it hereby is, continued in possession of its property and estate but none of the officers of said debtor corporation shall receive compensation for services rendered by them as such officers during the period that the debtor is thus continued in possession of its property from this date forward;

6. That said debtor be, and it hereby is authorized to operate its business and manage its property as may be necessary subject to the terms of this Order until the further Order of the Judge;

7. That on or before the 14th day of March, 1951, said debtor shall, at the expense of the estate, prepare, make oath to and file in court the following:

A. A schedule of its property showing the location, quantity and money value thereof.

B. A schedule of its creditors of each class, showing the amounts and character of their claims and securities and, so far as known, the name and post office address or place of business of each creditor.

C. A schedule of its stockholders of each class, showing the number and kind of shares registered in the name of each stockholder and the last known post office address or place of business of each stockholder.

8. That any and all matters arising in this proceeding except such matters as are reserved to the Judge by the provisions of Chapter X of the Act of Congress relating to Bankruptcy be, and they hereby are, referred to Honorable Van C. Griffin, Referee in Bankruptcy of the above-entitled Court, as Referee-Special Master, to determine herein and enter orders thereon; and any and all matters reserved to the Judge by Chapter X of said Act be, and they hereby are refererd to the said Van C. Griffin as Referee-Special Master, generally, to hear and report, said hearing or hearings to be held in Room 601, United States Court House, Seattle, Washington.

9. That the 14th day of March, 1951, at 10:00 o'clock a.m. is hereby fixed as the date for the hearing required by Sections 161 and 162, Chapter X

of the Bankruptcy Act, at which time the Judge may hear objections to the continuance of the debtor in possession. Said hearing will be held in Court # 1, United States Court House, Fifth Avenue and Spring Street, Seattle, Washington.

10. That creditors, stockholders or other interested parties may serve and file an answer or answers controverting the allegations of the petition of Puget Sound Products Co., herein at any time prior to but not later than the close of business on the 7th day of March, 1951.

11. The debtor corporation is hereby authorized and directed at the expense of the estate to have mimeographed copies of notices of the hearings ordered herein, with complete details of the time and place fixed, together with a concise summary of each and every provision of this order and mail a copy of the same to each and every creditor and stockholder and to the Securities & Exchange Commission, Seattle, Washington, by first class mail, said mailing to be done within seven days from the date of entry of this order.

12. This Court reserves the right and jurisdiction to make such orders, amplifying, extending or otherwise modifying this Order as to the Court May seem Proper.

Done in Open Court this 3rd day of February, 1951.

/s/ JOHN C. BOWEN,
Judge of the United States
District Court.

Presented by:

KENNETH J. SELANDER &
GEORGE T. NICKELL

Attorneys for the Debtor Corporation.

[Endorsed]: Filed February 3, 1951.

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[Title of District Court and Cause.]

ORDER

It appearing to the Court from the records and files herein and the Report of the Referee-Special Master that there is good cause for the Judge to now appoint a Trustee herein and that on August 27th, 1951, the Debtor in Possession filed its proposed Plan of Reorganization and that the same should be disposed of by notice;

Now Therefore, It Is Ordered that a hearing will be had on the 11th day of February, 1952, at ten o'clock a.m., at 601 U. S. Courthouse, Seattle, Washington, to consider said Plan of Reorganization, together with any and all amendments that any party may offer, and at the conclusion of said hearing enter an Order determining whether or not said Plan, with any amendments offered, is fair, feasible and equitable, and take such other action as may then be indicated.

It Is Further Ordered that Kenneth S. Treadwell is hereby appointed as Trustee of the Debtor;

Provided, however, that this appointment shall not take effect until the 18th day of February, 1952, and until said Trustee shall file his bond herein in the sum of One Thousand Dollars ($1,000.00), (to be increased if subsequent developments should indicate the necessity thereof), and any and all parties are notified that they may present any objections to the appointment of this Trustee at the hearing upon the proposed Plan of Reorganization on February 11th, 1952.

Notices of the hearing upon the Plan of Reorganization and of any objections to the appointment of the Trustee shall be given by the Referee-Special Master herein mailing a copy of this Order to all interested parties.

Done in Open Court this 21st day of January, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved:

/s/ VAN C. GRIFFIN,
Referee-Special Master.

[Endorsed]: Filed January 21, 1952.

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BOND

[Bond of Kenneth S. Treadwell, Trustee in Bankruptcy, for $1000.00, Fidelity & Deposit Company of Maryland, Surety, filed February 21, 1952.]

## ORDER INCREASING BOND

[Order increasing bond of Kenneth S. Treadwell, Trustee, to $10,000.00, filed March 13, 1952.]

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## ADDITIONAL BOND

[Additional Bond of Kenneth S. Treadwell, Trustee, for $9,000.00, Fidelity & Deposit Company of Maryland, Surety, filed March 20, 1952.]

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[Title of District Court and Cause.]

## PETITION

The Petition of Kenneth S. Treadwell respectfully represents:

1. That your Petitioner is the Trustee of Puget Sound Products Company, duly appointed and qualified.

2. That among the assets of this estate are certain machines, tools and equipment, as listed on the Trustee's Inventory on file in this proceedings; that said property is located in the former plant building of the Puget Sound Products Company at Houghton, Washington. That prior to the appointment of your Petitioner as Trustee herein, the real property upon which the machinery, tools and equipment is located, was foreclosed by the United States and subsequent to said foreclosure, Nelse Mortensen & Company became the owners of said real property by virtue of exercising an equity of redemption in the name of the Seattle Association of Credit Men.

3. That after the purchase of the real property by Nelse Mortensen & Co., Inc., the personal property consisting of the machinery, tools and equipment remained upon said property. That your Trustee is advised that Nelse Mortensen & Co., Inc., now make some claim to a number of the machines, tools and equipment by reason of said property having been affixed and having become thereby a part of the real property purchased by Nelse Mortensen & Co., Inc. That it is necessary in the orderly administration of this estate that Nelse Mortensen & Co., Inc., be required to appear before the Referee and make known to the Referee the nature and extent of any claims it may have upon any of the property listed in the Trustee's Inventory and that Nelse Mortensen & Co., Inc., show cause why an Order should not be entered in this proceedings decreeing all of the property listed on the Inventory be personal property and be free of any and all claims of Nelse Mortensen & Co., Inc.

Wherefore, your Trustee prays that an Order be entered herein requiring Nelse Mortensen & Co., Inc., to appear and show cause why all the property listed on the Trustee's Inventory should not be decreed to be free and clear of any and all claims of Nelse Mortensen Co., Inc.

/s/ KENNETH S. TREADWELL,
Trustee.

Duly verified.

[Endorsed]: Filed October 3, 1952, Referee.

[Endorsed]: Filed February 9, 1953, U.S.D.C.

[Title of District Court and Cause.]

## ORDER DIRECTING NELSE MORTENSEN & CO., INC., TO SHOW CAUSE

At Seattle, in Said District, on the 3rd day of October, 1952.

Upon the annexed Petition of Kenneth S. Treadwell, Trustee of Puget Sound Products Company, the above-named debtor, verified on the 2nd day of October, 1952, and sufficient reason appearing to me therefor, it is

Ordered that Nelse Mortensen & Co., Inc., appear before the Honorable Van V. Griffin, Referee-Special Master, in his Court Room, Room 600, Seattle, King County, Washington, on the 4th day of November, 1952, at the hour of 10:00 o'clock a.m., then and there to show cause why an Order should not be entered in this proceedings decreeing that all the property listed upon the Inventory of the Trustee is free and clear of any right, title, claim or interest of Nelse Mortensen & Co., Inc., and it is

Further Ordered that in the event Nelse Mortensen & Co., Inc., makes any claim to any of the property listed upon the Trustee's Inventory, said claim shall be made in writing, duly verified and served upon the Trustee at his office, 1313 Smith Tower, Seattle, Washington, not less than five days prior to the hearing; and it is

Further Ordered that service of a certified copy of this Order and the Petition upon which it is based be sent by registered mail to the last known

address of Nelse Mortensen & Co., Inc., 1021 Westlake Avenue N., Seattle, Washington, not less than fifteen (15) days prior to the date of this hearing, shall be deemed good and sufficient service herein.

/s/ VAN C. GRIFFIN,
Referee-Special Master.

Presented by:

/s/ KENNETH S. TREADWELL.

[Endorsed]: Filed October 3, 1952, Referee.

[Endorsed]: Filed February 9, 1953, U.S.D.C.

---

[Title of District Court and Cause.]

## ANSWER OF NELSE MORTENSEN & CO., INC., TO ORDER TO SHOW CAUSE

Comes now Nelse Mortensen & Co., Inc., a corporation, and for answer to the Order to Show Cause signed and filed in the above-entitled matter on October 3, 1952, alleges as follows:

I.

Nelse Mortensen & Co., Inc., a corporation, is the owner of, and hereby makes claim to, the following described property constituting fixtures and appurtenances to the real estate at Houghton, Washington, formerly owned by the Puget Sound Products Company, a corporation, to wit:

(1) 10-Ton Bridge Crane, and 15-Ton Bridge Crane, together with the tracks, motors, pulleys, cables, hoists and other equipment used in the operation thereof.

(2) Electrical lighting and power system, including all transformers, wiring, connections and equipment used in connection with said electrical system.

(3) Heating system, including all tanks and other equipment used in connection therewith.

(4) All boilers, furnaces and tanks, with motors and controls, now located in and annexed to the building on said premises, together with all water pipes and steam pipes, valves, connections and other equipment used in connection therewith.

(5) Overhead fire extinguisher in the building on said premises, including pumps, pipes, hoses, boiler, compressor, and other equipment used in connection therewith.

(6) All pumps, electric motors, starters, belts, belt conveyors, presses, tanks, furnaces, ovens, hoists, and other machinery and equipment now located in the building on said premises.

(7) Fire protection system located on the docks on said premises, including pumps, pipes, hoses, fittings, connections, and other equipment used in connection therewith.

(8) Trumbull electric switchboard.

(9) All other machinery and equipment now located in the fabricating shop and warehouse on said real estate, except portable machinery and equipment not annexed thereto and not used in connection with the operation of any of the foregoing.

II.

All of said machinery and equipment was installed in and about the building located on said premises, by the owner thereof, and annexed thereto, with the intention of making such machinery and equipment a permanent accession to the said premises and the fabricating shop and warehouse located thereon; and at all times since the installation and annexation thereof to said premises, said machinery and equipment has been applied to the use or purpose to which the said real property is appropriated, and constitutes fixtures, and is a part of said real estate.

Wherefore, your petitioner prays that a decree be entered herein quieting title in your petitioner, Nelse Mortensen & Co., Inc., a corporation, to all of the machinery, fixtures and equipment above described, and adjudging said machinery, fixtures and equipment to be appurtenant to and a part of the real estate belonging to your petitioner.

LYCETTE, DIAMOND & SYLVESTER,
Attorneys for Nelse Mortensen & Co., Inc.

By /s/ HERMAN HOWE.

Duly verified.

Received October 29, 1952.

[Endorsed]: Filed October 31, 1952, Referee.

[Endorsed]: Filed February 9, 1953, U.S.D.C.

[Title of District Court and Cause.]

## REPLY OF CLAIMANT, SEATTLE ASSOCIATION OF CREDIT MEN TO ANSWER OF NELSE MORTENSEN & CO., INC.

Comes now the claimant, Seattle Association of Credit Men and replying to the Answer of Nelse Mortensen & Co., Inc., to the Order to Show Cause issued herein at the instance of the Trustee, alleges as follows:

I.

Replying to paragraph I of the said Answer, this claimant denies each and every allegation therein contained.

II.

Replying to paragraph II of said Answer, this claimant denies each and every allegation therein contained.

And, Affirmatively, this claimant alleges as follows:

I.

That this claimant caused to be filed in the above-entitled court and in the above proceeding, its Proof of Secured Claim, being Claim No. 16 herein and wherein it made claim in this proceeding in the sum of $67,065.53, and alleging therein that at the time of the promissory note referred to in said claim, there were executed and delivered to this claimant by way of security, a real estate mortgage in trust covering certain real property therein described and a chattel mortgage in trust covering certain

personal property therein described. That attached to said claim were three exhibits: Exhibit A, being the original promissory note; Exhibit B, being a certified copy of the real estate mortgage in trust; Exhibit C, being a certified copy of the chattel mortgage in trust.

That the aforementioned claim and the attached exhibits are herewith incorporated in this Answer and made a part hereof as though set forth in full herein.

II.

That all of the property described, either specifically or generally, in the Answer of Nelse Mortensen & Co., Inc., has been, since July 7, 1949, covered and included in the chattel mortgage in trust executed by debtor to this claimant. That the said security was in existence upon all of the said property at the time Nelse Mortensen & Co., Inc., acquired title to the real estate of the debtor. That the said chattel mortgage in trust was not satisfied, nor paid at the time of the acquisition by the said Nelse Mortensen Co., Inc., of the title to said real estate.

III.

That it was and is the intention at all times by all parties having any title to, interest in, or lien upon, the real property and personal property of the debtor, whether same was attached or affixed to the real estate or not, that the two remain entirely separate and apart. That the debtor acquired title separately and gave separate purchase money mortgages to the United States of America for the

land and the buildings on the one hand and for the personal property, including everything listed in the Answer of Nelse Mortensen Co., Inc., on the other hand.

That the proceeding pursuant to which Nelse Mortensen Co., Inc., claims title to the property listed in its Answer resulted from the foreclosure of the real estate mortgage of the United States of America only. That Nelse Mortensen Co., Inc., purchased the certificate of redemption of the Seattle Association of Credit Men in said real estate, this claimant having been entitled to redemption by virtue of the fact that it was a junior mortgagee of said real estate.

IV.

That for the reason aforementioned, the right of Nelse Mortensen Co., Inc., to the property as listed in its Answer is junior and inferior to the rights and lien of this claimant, and the petition of said Nelse Mortensen Co., Inc., praying for a decree quieting title in it to the machinery, fixtures and equipment described in its Answer, should be dismissed.

Wherefore, this claimant prays that a decree be entered dismissing the petition of said Nelse Mortensen Co., Inc., in which it prays for a decree quieting title in it to the machinery, fixtures and equipment described in its Answer, and adjudging further, that said Nelse Mortensen Co., Inc., has no

right, title, interest, lien or claim of any kind thereto.

/s/ ALBERT M. FRANCO,

/s/ LEOPOLD M. STERN,

Attorneys for Claimant, Seattle Association of Credit Men.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 17, 1952. Referee.

[Endorsed]: Filed February 9, 1953. U.S.D.C.

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[Title of District Court and Cause.]

## MEMORANDUM DECISION OF REFEREE-SPECIAL MASTER

The United States of America owned the real and personal property constituting the Lake Washington Shipyards, which was used for boat building and repairing during the Second World War, and, after the war, acting thru different governmental agencies, sold said properties. A part of said property was sold by the Reconstruction Finance Corporation to the Puget Sound Products Company on or about May of 1948, and conveyed title by an instrument introduced herein as Mortensen's Exhibit #3 and by said instrument it described the real estate with particularity and contained the following paragraph:—

"Party of the first part further conveys and

quitclaims to party of the second part, its successors and assigns, all interest in the following described personal property, machinery and equipment:

1—45-ton Whirley Crane
1—15-ton Bridge Crane
1—10-ton Bridge Crane
1—7½-ton Bridge Crane
1—350-ton Joggling Press
2—Acetylene Generators
1—Auxiliary Fire Pump
1—Worthington Air Compressor
114—Bending and Welding Slabs with stools
6—Jib Cranes
1—Trumbull Switchboard
13—Transformers:
3—200 KVA-DPC Nos. 403-7,403-8,403-9
6—100 KVA-DPC Nos. 403-13, 403-14, 403-15, 403-22,403-28,403-31
1— 75 KVA-DPC No. 403-21
3— 50 KVA-DPC Nos. 403-18, 403-19, 403-20

The United States of America then owned that property and had a right to sell it as personal property, wholly independent of what might have been the rule as between landlord and tenant, buyer and seller, or the effect upon the freehold of removing the personalty.

Nelse Mortensen & Co., Inc., filed herein its Claim of Ownership to the above property based upon a redemption by it from a foreclosure sale on the real estate described in said Exhibit, contending that

the language following said real estate, to wit: "together with the buildings, structures and improvements located thereon," was broad enough to carry with it all of the above-described property and in its Brief filed herein wholly ignores the fourth page of said instrument, which contains the express language above quoted.

Furthermore, the Puget Sound Products Company always treated the foregoing property as personal property, as did W. L. Grill when he prepared a mortgage thereon and thereafter received an assignment to said mortgage, and as did the Seattle Association of Credit Men when it took a mortgage upon both the real and personal property, and as did this Court in receiving and accepting the Petition of the Puget Sound Products Company and appointing a Trustee herein who filed an Inventory of said property, all of which Nelse Mortensen & Co., Inc., had notice of by the public records of this county, and furthermore, it had specific notice when it examined the property in contemplation of redeeming and made and performed an agreement with the Puget Sound Products Company, Debtor in possession, to the effect that it and said Debtor would use said personal property for their mutual benefit and without charge by the Debtor for the use of the property. The fire prevention system is not described in the above-quoted language but an auxiliary fire pump is described in a Purchase Money Mortgage given by the Puget Sound Products Company to the Reconstruction Finance Cor-

poration, Trustee's Exhibit #9 herein, and for that reason the auxiliary fire pump was treated by the parties as personal property and has since so remained but the overhead fire prevention sprinkling system was not treated by the parties as personal property and was by them intended to be and was, in fact, a part of the building.

Findings of Fact, Conclusions of Law and Order in conformance with Rule 52 of the Rules of Civil Procedure for the District Courts of the United States may be prepared and presented on the 1st day of December, 1952, at 10 a.m.

Dated at Seattle, in said District, November 19, 1952.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed November 20, 1952. Referee.

[Endorsed]: Filed February 9, 1953. U.S.D.C.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON HEARING OF SHOW CAUSE ORDER DIRECTED TO NELSE MORTENSEN & CO., INC.

The Order directing Nelse Mortensen & Co., Inc., to appear before the Referee and show cause why an order should not be entered in this proceedings decreeing that all of the property listed in the

Inventory of the Trustee on file in this proceedings be free and clear of any right, title, claim or interest of Nelse Mortensen & Co., Inc., the respondent having answered said Order to Show Cause, and having made claims to certain specific property, the Trustee having denied said claims; the Seattle Association of Credit Men having appeared in this proceedings and having, in writing, denied the claim of Nelse Mortensen & Co., Inc., said action having come on duly and regularly for trial on the 17th and 18th days of November, 1952, the Trustee, Kenneth S. Treadwell, appearing in person; Nelse Mortensen & Co., Inc., appearing by Joseph Diamond and Herman Howe, its attorneys; the Seattle Association of Credit Men appearing by Albert Franco and L. M. Stern, its attorneys; witnesses having been sworn and testified, exhibits introduced, arguments of counsel having been heard, and the Referee having rendered his Memorandum Decision, the Referee now makes the following:

## Findings of Fact

### I.

That Kenneth S. Treadwell is the Trustee of Puget Sound Products Co., duly appointed and qualified.

### II.

That said Trustee prepared and filed in this proceedings an Inventory of all the property of the debtor, all the said property being personal property, the debtor having owned no real property at the time it filed its petition for reorganization. A

copy of said Inventory is attached hereto, marked "Exhibit A," and by this reference incorporated herein.

III.

The United States of America owned the real and personal property, constituting the Lake Washington Shipyard, which was used for boat building and repairing, during the Second World War. That part of the real and personal property was purchased by the Puget Sound Products Co. from the Reconstruction Finance Corporation, acting through the War Assets Administration, on 16 December, 1947.

IV.

That the property acquired by the Puget Sound Products Co. was purchased by it pursuant to an "Invitation for Bids for Sale or Lease of Surplus Real Property Facilities, and Personal Property," issued by the War Assets Administration (Trustee's Exhibit 7), that said invitation for bids required separate bids to be submitted for the real property and the personal property offered. That pursuant to said invitation, the Puget Sound Products Co. submitted a bid for the real property and a separate bid for the personal property. Said bids were rejected by the War Assets Administration and a negotiated sale was later made to the Puget Sound Products Co. of the real estate and the personal property by the War Assets Administration. Said property was conveyed and sold to the Puget Sound Products Co. by the Reconstruction Finance Cor-

poration through the War Assets Administration by an instrument in evidence herein, denominated "Quit Claim Deed" (Mortensen's Exhibit 3). That said instrument described the real estate with particularity and contains the following paragraph:

"Party of the first part further conveys and quit-claims to party of the second part, its successors and assigns, all interest in the following-described personal property, machinery and equipment:

1—45-ton Whirley Crane
1—15-ton Bridge Crane
1—10-ton Bridge Crane
1—7½-ton Bridge Crane
1—350-ton Joggling Press
2—Acetylene Generators
1—Auxiliary Fire Pump
1—Worthington Air Compressor
114—Bending and Welding Slabs with Stools
6—Jib Cranes
1—Trumbull Switchboard
13—Transformers:
3—200 KVA—DPC Nos. 403-7, 403-8, 403-9,
6—100 KVA—DPC Nos. 403-13, 403-14, 403-15, 403-22, 403-28, 403-31
1—75 KVA—DPC No. 403-21
3—50 KVA—DPC Nos. 403-18, 403-19, 403-20."

V.

That simultaneously with the delivery of the "Quit Claim Deed" to the Puget Sound Products Co., said Puget Sound Products Co. made, executed

and delivered to the Reconstruction Finance Corporation through the War Assets Administration, its Promissory Note in the amount of $38,361.60, being the unpaid balance of the purchase price due for said real property, and as security for the payment of said Note, the Puget Sound Products Co., at the time of the delivery of said Note, made, executed and delivered to the Reconstruction Finance Corporation, through the War Assets Administration, a "Purchase Money Mortgage," dated 16 December, 1947, and executed 14 May, 1948.

VI.

That simultaneously with the delivery of the "Quit Claim Deed" (Mortensen's Exhibit 3), Puget Sound Products Co. made, executed and delivered to the Reconstruction Finance Corporation, through the War Assets Administration, its Promissory Note, dated 16 December, 1947, (Trustees's Exhibit 8) in the amount of $32,678.40, being the unpaid balance of the purchase price for the personal property set out in paragraph IV above, and as security for the payment of said Promissory Note, Puget Sound Products Co. executed and delivered to the Reconstruction Finance Corporation, through the War Assets Administration, a Chattel Mortgage, denominated "Purchase Money Chattel Mortgage," dated 16 December, 1947, and executed 14 May, 1948 (Trustee's Exhibit 9). That said Chattel Mortgage was duly and timely filed with the Auditor of King County on 17 May, 1948.

VII.

That the Puget Sound Products Co. failed to make payments to the Reconstruction Finance Corporation as required by its Promissory Notes and on or about 1 July, 1949, when the Reconstruction Finance Corporation was threatening to foreclose the two mortgages securing said Notes, the Puget Sound Products Co. paid in full the Promissory Note (Trustee's Exhibit 8), and the chattel mortgage securing the same was satisfied.

VIII.

That on 27 June, 1949, Puget Sound Products Co. made, executed and delivered its Promissory Note in the amount of $12,500.00 to the United States Sheetwood Company and to secure the same, made, executed and delivered to the United States Sheetwood Company a chattel mortgage (Trustee's Exhibit 18) upon the identical property covered in the Reconstruction Finance Corporation chattel mortgage, and listed in paragraph IV above. That said chattel mortgage was duly and timely filed with the Auditor of King County, Washington, on 6 July, 1949. Said chattel mortgage was, by an instrument in writing, assigned by the United States Sheetwood Company to W. L. Grill on 4 August, 1949.

IX.

That on 7 July, 1949, the Puget Sound Products Co. made, executed and delivered to the Seattle Association of Credit Men, a corporation, a real estate mortgage in trust, covering upon the identi-

cal real property acquired by the Puget Sound Products Co. from the United States of America and on 7 July, 1949, the Puget Sound Products Co. also made, executed and delivered a chattel mortgage in trust (Trustee's Exhibit 10) to the Seattle Association of Credit Men, covering upon all the personal property, acquired from the United States, together with other personal property acquired up to the date of the execution of said chattel mortgage. The property secured by the chattel mortgage in trust to the Seattle Association of Credit Men is the same property as listed in the Trustee's Inventory, with the exception of one 3000 per square inch, 60-gal. per minute oil pump, said property having been acquired subsequent to the execution of the chattel mortgage in trust by the Puget Sound Products Co. to the Seattle Association of Credit Men. Said mortgages in trust were to secure a Promissory Note dated 7 July, 1949, made by the Puget Sound Products Co. to the Seattle Association of Credit Men in the amount of $80,000.00.

X.

That the Puget Sound Products Co., having failed to make any of the payments due on its Note for the purchase price of the real estate, the Reconstruction Finance Corporation, in proceedings in the District Court of the United States for the Western District of Washington, Northern Division, Cause No. 2479, entitled "United States of America, Plaintiff, vs. Puget Sound Products Co., Seattle Association of Credit Men, State of Wash-

ington, and Unknown Owners, Defendants," commenced an action on the Note held by the Reconstruction Finance Corporation representing the unpaid balance of the purchase price for the real property. That in said action, a judgment was granted in favor of the United States of America against Puget Sound Products Co. in the sum of $47,702.37, and said judgment decreed the foreclosure of the purchase money mortgage, covering upon real property. Said decree being entered by the District Court on the 5th day of September, 1950. Pursuant to the decree of foreclosure, the United States Marshal sold the real estate to the United States on the 21st day of October, 1950, the purchase price being the amount of the judgment rendered in favor of the United States of America. Said sale was confirmed by the District Court on the 15th day of November, 1950.

XI.

That on the 5th day of November, 1951, the Seattle Association of Credit Men, pursuant to an agreement with Nelse Mortensen & Co., Inc., redeemed said real property and on 26 November, 1951, the United States Marshal issued his certificate of redemption of said property to the Seattle Association of Credit Men and said certificate was assigned to Nelse Mortensen Co., Inc., by the Seattle Association of Credit Men on 30 November, 1951. Pursuant to Order of Court entered in the foreclosure proceedings on 21 January, 1952, the United States Marshal issued a Deed to said real

estate to Nelse Mortensen & Co., Inc. (Mortensen's Exhibit 4).

XII.

That prior to the redemption of said property, Nelse Mortensen & Co., Inc., was making a search for a local plant site suitable for manufacture of prefabricated houses. That a representative of Nelse Mortensen & Co., Inc., Mr. Slater, examined the property of the Puget Sound Products Co. and was shown about the premises by Worth C. Goss, vice-president of Puget Sound Products Co. That thereafter, and prior to acquiring said real property by assignment of the certificate of redemption, the premises were examined by Nelse Mortensen, Cliff Mortensen and Don Henderson, the president, vice-president and superintendent, respectively, of Nelse Mortensen & Co., Inc. That on the occasions of these examinations, Worth C. Goss made it clear to said persons that all of the machinery, tools and equipment on the premises were the property of the Puget Sound Products Co.

XIII.

That prior to the acquisition of said property by Nelse Mortensen & Co., Inc., Nelse Mortensen & Co., Inc., through its officers, entered into an agreement with the Puget Sound Products Co. to the effect that Nelse Mortensen & Co., Inc., would have the use of certain of the personal property on the premises belonging to Puget Sound Products Co., in consideration of which the Nelse Mortensen &

Co., Inc., would grant to the Puget Sound Products Co. free rent for the use of that portion of the premises occupied by the Puget Sound Products Co. and said agreement was thereafter performed.

XIV.

That Nelse Mortensen & Co., Inc., attempted to acquire said real property through the right of redemption belonging to the Puget Sound Products Co., but were not able to do so because of certain judgments of record existing against the Puget Sound Products Co. That thereafter, and at the suggestion of the officers of the Puget Sound Products Co., Nelse Mortensen & Co., Inc., contacted the Seattle Association of Credit Men for the purpose of acquiring said property through the right of redemption belonging to the Seattle Association of Credit Men. That an agreement was entered into between the Seattle Association of Credit Men and Nelse Mortensen & Co., Inc., whereby the Seattle Association of Credit Men would exercise the right of redemption belonging to it, and acquire said property thereby, and transfer said property to Nelse Mortensen & Co., Inc. That said agreement was performed. That all funds used for the redemption of said property by the Seattle Association of Credit Men were advanced by Nelse Mortensen & Co., Inc. Upon the certificate of redemption being assigned to Nelse Mortensen & Co., Inc., Nelse Mortensen & Co., Inc., paid the sum of $750.00 to the Seattle Association of Credit Men for the assignment of the equity of redemption.

XV.

That all of the property listed in the Trustee's Inventory in this proceedings was at all times treated by the Puget Sound Products Co. as personal property, and that all machinery, tools and equipment acquired by the Puget Sound Products Co. from the United States of America was at all times treated by the United States of America as being personal property.

XVI.

That all of the property listed on the Trustee's Inventory was treated by this Court as personal property when this Court approved the filing of a Petition in Reorganization by the Puget Sound Products Co., all of which Nelse Mortensen & Co., Inc., had notice by reason of the same being public record.

XVII.

That the fire prevention system, except the auxiliary fire pump, was treated by all parties as being part of the real property and not personal property. That the auxiliary fire pump was treated by all parties as being personal property of the Puget Sound Products Co.

From the foregoing Findings of Fact, the Referee makes the following

Conclusions of Law

I.

That the Trustee is entitled to enter in this proceedings a decree adjudging all of the property

listed on the Trustee's Inventory, as set forth in Exhibit A attached hereto, decreeing that the same is free and clear of any right, title or claim of interest of Nelse Mortensen & Co., Inc.

II.

That the fire prevention system, except the auxiliary fire pump, is a part of the real property and the title thereto passed to Nelse Mortensen & Co., Inc., upon its acquisition of the real estate.

Entered this 12th day of January, 1953.

/s/ VAN C. GRIFFIN,
Referee.

Presented by:

/s/ KENNETH S. TREADWELL,
Trustee.

Copy received 12/2/52, and Notice of Presentation waived.

/s/ ALBERT M. FRANCO,
Atty. for Seattle Assn. of
Credit Men.

EXHIBIT A

Personal Property

Located at: Houghton, Washington—Puget Sound Products Company (in Plant).

Production line steamer.
Chip meter.
18″ Interplane Grinder (Allis-Chalmers).
26″ Interplane Grinder, 2/motor (Allis-Chalmers).
26″ Interplane Grinder, 2/motor (Allis-Chalmers).
Magnetic starter (Allis-Chalmers).
Magnetic starter (Allis-Chalmers).
Grinding Machine (Allis-Chalmers), w/motor.
Fibre Drier (rotary).
1—5′ x 12′ Allis-Chalmers Ripl-Flo Screens and supports.
Traveling belt.
Precompression Press.
Hydraulic Power Unit #BP 2010 D 113.
Dowtherm Boiler (Eclipse) w/motors & controls #13422.
Dowtherm Boiler (Eclipse).
Dowtherm Boiler (Eclipse).
Drying over w/motor & controls.
Sterling Type water tube boiler.
Oscillating spouts.
Separators.
Motorized fans and blowers.
Belt conveyors.
Ducts and pipe work.
Conveyor sections.
49″—3—drum Sheboygan Sander w/4 motors.

#3 Beach double cut-off saw. Ser. #48F20.
Delta tilting table circular saw. Ser. #61-1699.
Sundstrand sander model 1000-A #574-1A w/hose.
Electric Sump pump.
Jaeger Sure Prime Pump w/motor.
IMA 330 Pump.
Pump and tank.
Worthington rotary gear pump.
Centrifugal pump (American Marsh) C80072.
3—2″ Gramco pumps.
Worthington gear pump 490 RG 5.
3—Plastic feeding tanks.
420 gallon tank.
60 gallon tank.
425 gallon tank, 10 HP.
Allis-Chalmers electric motor, 10 HP,
713 D N-51435—1945.
Master Speedranger electric motor, UR22033
⅓ HP.
Allis-Chalmers 50 HP Electric Motor.
Allis-Chalmers 20 HP Electric Motor.
7½ HP Electric Motor.
Master single herringbone gearhead motor.
10—5 KVA capacitors.
Radial drill w/motors.
Armstrong grinder.
Dravo Heater #1817.
1 Ton Budget Hoist.
1 Ton chain block hoist.
Single worm gearhead motor.
Dunlap Electric motor.
¼ HP Electric motor.

¾ HP Electric motor.
1 HP Electric motor.
¼ HP Whirlaway Electric motor.
¼ HP Electric motor.
½ HP Westinghouse Electric motor, 116004.
¾ HP U. S. Suncrogear electric motor.
¼ HP Master gearhead motor.
Forge.
3—Pipe threaders.
Gardner Denver Air Compressor, #101542.
Revolvator "Red Giant" Lift Truck, M32910.
Hobart 300 amp. portable welder.
Hobart Arc Welder, DN 18721.
Welding machine accessories.
44" New Haven swing lathe.
5# Fire extinguisher.
Fibre Boxes.
3 Barkers.
Secondary Press.
2 Rotary gear pumps.
⅓ HP Electric motor, 451 15 R9.
2—2 HP Electric motors, M-51453, 3676 & 2657.
1½" 9B Waterous iron pump.
Master Electric Motor, ½ HP.
Electric motor with coupling, #N-51453-2305.
Electric Motor, ¼ HP, W-2323018.
Oilgear 7½ HP motor driven hydraulic pump.
Vickers Oil pump.
10 Ton Bridge Crane.
Farquhar Press.
6 Jib Cranes.
Air Compressor.

3 G. E. 100 KVA transformers.
3 Allis-Chalmers 50 KVA transformers.
7 Transformers:
    3 Pittsburgh Transformers, 100 KVA.
    3 G. E. Transformers, 200 KVA.
    1 Maloney Transformer, 75 KVA.
Trumbull Electric switchboard.
1 Baldor grinder, Ser. #P-13154.
1 Glenn-Roberts Arc Welder, Mod. #20, Ser. A1345.
1 Lot Wood horses.
1 Marvel draw cut metal saw.
1 Lot small tools, consisting mainly of hammers, saws, wrenches, pliers, etc.
2 HP General Electric motor, 5K 225 D45.
15 ton Bridge Crane.
1 1941 Ford ½ ton truck, Motor #18-5942595.
Cincinnati bench grinder, Ser. #170161.

Property located at Plant not covered by Seattle Association of Credit Men Mortgage:

3000# per sq. inch—60 gal. per min. oil pump.

Personal Property

Located at Houghton, Washington, Puget Sound Products Company (in Plant Laboratory).

Buffing machine.
Craftmaster Belt sander and motor, Ser. #103-0803.
½ HP Electric Motor, B-Line, Ser. #N.2300566.
¼ HP Electric Motor.
Skill Drill, No. 499932.

UFH Thor ¾" drill, Ser. #1023472.
¼ HP Grinder.
U. S. Renor heater.
Diagraph stencil machine, 16A4339.
1—24 standard drafter, Ser. #SN 62482742.
Desk Lamp.

Office Furniture in Plant Laboratory

Stationery cabinet (wood).
Typewriter desk (oak).
Executive desk (oak).
Steel Steno chair.
Royal Typewriter, Ser. #KMM12-3581027.
Art Metal 4-drawer file.
Walnut desk and swivel chair.
2 Arm chairs.
2 straight back chairs.
F & E Check protector, Ser. #2981437.
2 costumers.

Located at Houghton, Washington, Outside Storage:
Sumner Iron Works Chipper (51"), #1467.
Allis-Chalmers Motor (for chipper), 100 HP, 1200 RPM, Ser. #25200K-823E-1-1.
Compensator starter for chipper motor, 100 HP.
Chip tank.
2 Airco Generators.
1 Chip hydrator.
1 Lot metal racks.

[Endorsed]: Filed January 12, 1953. Referee.

[Endorsed]: Filed February 9, 1953. U.S.D.C.

[Title of District Court and Cause.]

## ORDER ON ORDER TO SHOW CAUSE DIRECTED TO NELSE MORTENSEN & CO., INC.

This Matter, having come on duly and regularly for trial before the undersigned Referee in Bankruptcy on the 17th and 18th days of November, 1952; the Trustee appearing in person; the respondent, Nelse Mortensen & Co., Inc., appearing by Josef Diamond and Herman Howe, its attorneys; the Seattle Association of Credit Men appearing by Albert Franco and Leopold M. Stern, its attorneys; the Referee having heretofore entered his Findings of Fact and Conclusions of Law, now, therefore, it is

Ordered that all of the property listed on the Trustee's Inventory on file herein is free of any right, title or claim or interest of Nelse Mortensen & Co., Inc., and it is further

Ordered that the fire prevention system, except the auxiliary fire pump, has been affixed to the real property and is the property of Nelse Mortensen & Co., Inc.

Entered this 12th day of January, 1953.

/s/ VAN C. GRIFFIN,
Referee.

Presented by:

/s/ KENNETH S. TREADWELL,
Trustee.

[Endorsed]: Filed January 12, 1953. Referee.

[Endorsed]: Filed February 9, 1953. U.S.D.C.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW ON NELSE MORTENSEN & CO., INC., APPLICATION FOR RENT

The application by Nelse Mortensen & Co., Inc., for a determination of a reasonable rental to be assessed against the above-named debtor estate for the use and occupancy by the debtor estate of a certain portion of real property belonging to Nelse Mortensen & Co., Inc., having come on duly and regularly for hearing on the 22nd day of December, 1952, the applicant, Nelse Mortensen & Co., Inc., appearing by Josef Diamond and Herman Howe, its attorneys; the Trustee, Kenneth S. Treadwell, appearing in person, no other or adverse parties appearing; witness having been sworn and having testified, exhibits having been introduced, argument of counsel having been heard and the Court having rendered its oral memorandum decision, the Referee now makes the following

### Findings of Fact

I.

That Kenneth S. Treadwell is the Trustee of the Puget Sound Products Company, duly appointed and qualified.

II.

That on or about the 15th day of November, 1951, Nelse Mortensen & Co., Inc., acquired the real property formerly belonging to Puget Sound Products Co., located at Houghton, Washington.

III.

That at the time of the acquisition of said real property, there was stored on the premises certain machinery and equipment which was the property of the Puget Sound Products Co.

IV.

That prior to the acquisition of the real property by Nelse Mortensen & Co., Inc., said company, through its president and vice-president, Nelse Mortensen and Frank Henderson, respectively, entered into an agreement with the Puget Sound Products Co. through Worth C. Goss, regarding the use by the Puget Sound Products Co. of a portion of said real property for the storage of its equipment.

V.

That under the terms of the oral agreement, the Nelse Mortensen & Co., Inc., was to have the use of such equipment of the Puget Sound Products Co. as it might desire in return for which the Puget Sound Products Co. was to have free storage for its equipment at the premises. Said arrangement was to extend for a period of six months from the date of the acquisition of the real property by Nelse Mortensen & Co., Inc.

VI.

That after Nelse Mortensen & Co., Inc., acquired said real property said Nelse Mortensen & Co., Inc., used such equipment of the Puget Sound Products

Co. as it desired, and in particular, the large bridge cranes.

VII.

That at the end of the six-month period, Nelse Mortensen & Co., Inc., continued thereafter to use such equipment of the Puget Sound Products Co. as it desired and the Puget Sound Products Co. continued to occupy certain of the real property for the storage of its equipment. That this arrangement continued up to the 1st of September, 1952, when Nelse Mortensen & Co., Inc., leased the space occupied by the Puget Sound Products Co. to Edward H. Heller.

From the foregoing Findings of Fact, the Referee now makes the following:

Conclusions of Law

I.

That Nelse Mortensen & Co., Inc., are entitled to no allowance in this proceedings for any rent for any space occupied by Puget Sound Products Co. for storage of its equipment at the Houghton, Washington, plant.

Made this 12th day of January, 1953.

/s/ VAN C. GRIFFIN,
Referee.

Presented by:

/s/ KENNETH S. TREADWELL,
Trustee.

[Endorsed]: Filed January 12, 1953. Referee.
[Endorsed]: Filed February 9, 1953. U.S.D.C.

[Title of District Court and Cause.]

## ORDER ON APPLICATION OF NELSE MORTENSEN & CO., INC., FOR ALLOWANCE OF REASONABLE RENT

The application of Nelse Mortensen & Co., Inc., for an allowance for rent, as an expense of this administration, for certain space occupied by Puget Sound Products Co. for the storage of its machinery and equipment at the Houghton, Washington, plant owned by Nelse Mortensen & Co., Inc., having come on duly and regularly for hearing on the 22nd day of December, 1952, and the Referee having heretofore entered his Findings of Fact and Conclusions of Law, now, therefore,

It Is Ordered that the application of Nelse Mortensen & Co., Inc., for an allowance of rent for premises occupied by the Puget Sound Products Co. in the storage of its machinery and equipment at the Houghton, Washington, plant, be, and the same is hereby denied and disallowed.

Entered at Seattle this 12th day of January, 1953.

/s/ VAN C. GRIFFIN,
Referee.

Presented by:

/s/ KENNETH S. TREADWELL,
Trustee.

[Endorsed]: Filed January 12, 1953. Referee.

[Endorsed]: Filed February 9, 1953. U.S.D.C.

[Title of District Court and Cause.]

## PETITION TO REVIEW ORDERS OF REFEREE

The petition of Nelse Mortensen & Co., Inc., a corporation, respectfully shows:

I.

That on the 12th day of January, 1953, an "Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc.," was made and entered herein by the Referee-Special Master, a copy of which is hereto attached marked "Exhibit A" and by this reference made a part hereof.

II.

That on the said 12th day of January, 1953, an "Order on Application of Nelse Mortensen & Co., Inc., for Allowance of Reasonable Rent" was made and entered herein by the Referee-Special Master, copy of which is hereto attached, marked "Exhibit B" and by this reference made a part hereof.

III.

That the said "Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc.," is erroneous in the following particulars, to wit:

(1) In adjudging that all of the property listed on the Trustee's Inventory on file herein is free from any right, title, claim or interest of Nelse Mortensen & Co., Inc.

(2) In failing to adjudge and decree that the following-described property constitutes fixtures and improvements to the real estate belonging to Nelse Mortensen & Co., Inc., and belongs to the said Nelse Mortensen & Co., Inc., to wit:

(a) 10-ton Bridge crane, and 15-ton Bridge crane, together with the tracks, motors, pulleys, hoists, cables and other equipment used in the operation thereof.

(b) Electrical lighting and power system, including all transformers, wiring, connections and equipment used in connection with said electrical system.

(c) Heating system, including oil tank, oil burner, pipes, and other equipment used in the operation thereof.

(d) Boiler located on east side of said building, together with all water and steam pipes, valves and other equipment used in connection therewith.

(e) Auxiliary fire pump used for and connected to the fire protection system on the docks on said premises.

(f) Compressor used for and connected with overhead fire protection system.

(g) Trumbull electric switchboard.

IV.

That the said "Order on Application of Nelse Mortensen & Co., Inc., for Allowance of Reasonable Rent" is erroneous in the following particulars:

(1) In denying and disallowing the application of Nelse Mortensen & Co., Inc., for allowance of rent for the premises at Houghton, Washington, owned by Nelse Mortensen & Co., Inc., and occupied by the Trustee for Puget Sound Products Co.

Wherefore, your petitioner, feeling aggrieved because of the said orders, and each of them, prays that both of said orders be reviewed by a Judge of this Court, as provided in the Act of Congress relating to bankruptcy.

Dated this 13th day of January, 1953.

NELSE MORTENSEN & CO., INC.,
Petitioner.

By LYCETTE, DIAMOND & SYLVESTER,

/s/ JOSEF DIAMOND,

/s/ HERMAN HOWE,
Attorneys for Petitioner.

Duly verified.

[Copy of orders of Referee, dated January 12, 1953, attached to foregoing Petition.]

[Endorsed]: Filed January 16, 1953. Referee.

[Endorsed]: Filed February 9, 1953. U.S.D.C.

[Title of District Court and Cause.]

## REFEREE'S CERTIFICATE ON REVIEW—RE MORTENSEN'S CLAIM OF OWNERSHIP

To the Honorable William J. Lindberg, United States Judge:

I, Van C. Griffin, Referee in Bankruptcy in charge of this proceeding, do hereby certify:

The question presented, the decision thereon and the procedure through which it came before the Referee is set forth in the Memorandum Decision of the Referee transmitted herewith and will not be duplicated in this Certificate.

Findings of Fact, Conclusions of Law and Order in conformity with said Memorandum Decision were entered and Nelse Mortensen & Co., Inc., filed its Petition for Review.

### Papers Transmitted

1. Petition of Trustee.
2. Order Directing Nelse Mortensen & Co., Inc., to Show Cause.
3. Answer of Nelse Mortensen & Co., Inc., to Order to Show Cause.
4. Reply of Claimant, Seattle Association of Credit Men, to Answer of Nelse Mortensen & Co., Inc.
5. Memorandum of Authorities and Trial Brief of Nelse Mortensen & Co., Inc.
6. Findings of Fact and Conclusions of Law

Upon Hearing of Show Cause Order Directed to Nelse Mortensen & Co., Inc.

7. Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc.

8. Memorandum Decision of Referee-Special Master.

9. Petition to Review Orders of Referee.

10. Transcript of Evidence.

11. Exhibits transmitted:

#1. Certified copy of Warranty Deed, Lake Washington Shipyards to Defense Plant Corporation, dated June 19, 1941.

#2. Certified copy of Purchase Money Mortgage, Puget Sound Products Co. to R.F.C., dated Dec. 16, 1947.

#3. Certified copy Quit Claim Deed dated Dec. 16, 1947, R.F.C. to Puget Sound Products Co.

#4. Certified copy of proceedings in foreclosure action.

#5. Original U. S. Marshal's Deed on Foreclosure (stipulated that a certified copy could be substituted).

#6. Plan of Lake Washington Shipyards.

#7. Invitation for Bids, War Assets Administration.

#8. Promissory note dated Dec. 16, 1947, Puget Sound Prod. Co. to R.F.C.

#9. Purchase Money Chattel Mortgage, dated Dec. 16, 1947, Puget Sound Products Co. to R.F.C.

#10. Certified copy of Chattel Mortgage in Trust, Puget Sound Products Co. to Seattle Assn. of Credit Men.

#11. Letter of Nelse Mortensen & Co. to Puget Sound Products Co.

#12 to #17, inclusive. Blueprints of Shipyards.

#18. Certified copy of Affidavit of Renewal of Chattel Mortgage, Puget Sound Products Co. to U. S. Sheetwood.

#19. Copy of letter from W. L. Grill to War Assets Administration, dated March 15, 1948.

#20. Letter from war Assets Administration, to W. L. Grill, dated May 13, 1948.

Dated at Seattle this 9th day of February, 1953.

Respectfully submitted,

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed February 9, 1953.

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[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW—RE MORTENSEN'S CLAIM FOR STORAGE OR RENT

To the Honorable William J. Lindberg, United States Judge:

I, Van C. Griffin, Referee in Bankruptcy in charge of this proceeding, do hereby certify:

During the hearing of the Answer of Nelse Mortensen & Co. to the Trustee's Order to Show Cause, wherein it claimed ownership of certain personal property, it appeared to the parties and to the Referee that Nelse Mortensen & Co., Inc., may assert some claim for storage of the property which

it was claiming to own and that whatever claim it may have should be heard at the same time and the same were heard together and the transcript of the evidence of said hearing has this day been transmitted, together with certain exhibits, for Review upon the Order of the Referee made at the conclusion of said hearing.

The question as to Mortensen's claim for storage or rent had not been concluded when the Referee rendered its Memorandum Decision and a subsequent hearing was had concerning said claim and at the conclusion of that hearing and after considering all of the evidence at both hearings, the Referee made Findings of Fact, Conclusions of Law and entered an Order denying Mortensen & Co. any claim for storage or rent and its Petition for Review included a Review from that Order.

The question presented and the decision made may be stated as follows:

The Gosses, acting for the Debtor in Possession, Edward H. Heller, and possibly some others, made an oral agreement with Nelse Mortensen & Co. whereby they would assist it in redeeming the real estate upon which the Puget Sound Products plant was located from a mortgage or foreclosure sale and furnish to it free power for the operation of its business of fabricating houses and permit it to use a substantial part of the machinery belonging to the Puget Sound Products Company.

Heller and his associates were to have joint use of the real and personal property for their business of making laboratory tests.

This arrangement was made about November 3rd, 1951, and was to be in effect for six months, but it was in fact carried out for about ten months.

The Trustee for the Puget Sound Products Company had no employees and carried on no experimental or manufacturing work of any kind and did not rent any real estate by order of the Court or otherwise and received no benefits from Nelse Mortensen & Co., Inc., except that his machinery was on the land owned by Nelse Mortensen & Co., Inc., but the value of the use by Nelse Mortensen & Co., Inc., of said machinery and its right to use the same was greater than any benefits by way of storage received by the Trustee.

The question decided was that there was no agreement to pay storage and that the agreement as made contemplated that there would be no charge for storage.

Papers Transmitted

In addition to the papers transmitted with the Petition for Review by Nelse Mortensen & Co., Inc., on its claim for ownership, there is transmitted the following:

1. Findings of Fact and Conclusions of Law on Nelse Mortensen & Co., Inc., Application for Rent.
2. Order on Application of Nelse Mortensen & Co., Inc., for Allowance of Reasonable Rent.
3. Exhibits transmitted:

#1—Original Lease dated Sept. 1, 1952, between Nelse Mortensen & Company, Inc., and Edward H. Heller.

#2—Statements for rental of premises—dated April 5, 1952, May 5, 1952, June 5, 1952, and July 5, 1952, from Nelse Mortensen & Co. to Puget Sound Products Co.

#3—Original Agreement dated Nov. 5, 1951, signed by Seattle Assn. of Credit Men.

#4—Original Quit Claim Deed dated Nov. 5, 1951, from Seattle Assn. of Credit Men to Nelse Mortensen & Co., Inc., covering certain real property therein described.

Dated at Seattle, this 9th day of February, 1953.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed February 9, 1953.

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 38,838

In Proceedings for the Reorganization of a Corporation

In the Matter of

PUGET SOUND PRODUCTS CO., a Corporation.

ORDER ON REVIEW OF "ORDER ON ORDER TO SHOW CAUSE DIRECTED TO: NELSE MORTENSEN & CO., INC."

The petition of Nelse Mortensen & Co. for review of the above-entitled order entered by the

Referee-Special Master on the 12th day of January, 1953, having come on duly and regularly for hearing before the undersigned Judge of the United States District Court, the petitioner appearing by Herman Howe and Josef Diamond of Lycette, Diamond and Sylvester, it's attorneys; the trustee appearing in person; the Seattle Association of Credit Men appearing by Albert Franco, one of its attorneys; the Judge having reviewed the record and having heard arguments of counsel and examined the law applicable and having rendered a Memorandum Decision concerning said Order, now, therefore, it is

Ordered that the petition for review of the above-entitled Order, filed by Nelse Mortensen & Co., Inc., be, and the same is hereby, dismissed, and the Order of the Referee-Special Master is affirmed.

Entered at Seattle this 6th day of April, 1953.

/s/ WILLIAM J. LINDBERG,
Judge of the United States
District Court.

Presented by:

/s/ KENNETH S. TREADWELL.

[Endorsed]: Filed April 6, 1953.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 38,838

In Proceedings for the Reorganization of a Corporation

In the Matter of

PUGET SOUND PRODUCTS CO., a Corporation.

ORDER ON REVIEW OF "ORDER ON APPLICATION OF NELSE MORTENSEN & CO., INC., FOR REASONABLE RENT"

The petition of Nelse Mortensen & Co., Inc., for review of the above-entitled order having come on duly and regularly for hearing on the 24th day of March, 1953, before the undersigned Judge of the United States District Court, the petitioner appearing by Herman Howe and Josef Diamond, its attorneys; the Trustee appearing in person; the Judge having reviewed the record, and having heard argument of counsel and examined the law applicable and rendered his Memorandum Decision affirming the Order of the Referee-Special Master, now, therefore, it is

Ordered that the petition for review, filed by Nelse Mortensen & Co., Inc., of the above-entitled Order, be, and the same is hereby dismissed, and the Order of the Referee-Special Master be, and the same is hereby, affirmed.

Entered at Seattle this 6th day of April, 1953.

/s/ WILLIAM J. LINDBERG,
Judge of the United States
District Court.

Presented by:

/s/ KENNETH S. TREADWELL.

[Endorsed]: Filed April 6, 1953.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Nelse Mortensen & Co., Inc., respondent and claimant in the above-entitled matter, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the following orders made and entered in the above-entitled matter on April 6, 1953, to wit:

1. Order on Review of "Order on Order to Show Cause Directed to: Nelse Mortensen & Co., Inc."

2. Order on Review of "Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent."

LYCETTE, DIAMOND &
SYLVESTER,

By /s/ HERMAN HOWE,

Attorneys for Appellant, Nelse Mortensen & Co., Inc.

[Endorsed]: Filed May 1, 1953.

[Title of District Court and Cause.]

## COST BOND ON APPEAL

Know All Men by These Presents: That we, Nelse Mortensen & Co., Inc., as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as Surety, are held and firmly bound unto the United States of America in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, for which sum well and truly to be paid, the undersigned Principal and Surety bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas, the Principal above named, respondent and claimant in the above-entitled matter, has appealed or is about to appeal to the Circuit Court of Appeals for the Ninth Circuit from the following described orders made and entered in the above proceeding on April 6, 1953, to wit:

1. Order on Review of "Order on Order to Show Cause Directed to: Nelse Mortensen & Co., Inc."

2. Order on Review of "Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent", and

Whereas, the Principal above named, as a condition to such appeal, is obligated to furnish this bond for the payment of costs in the sum of $250.00.

Now, Therefore, if Nelse Mortensen & Co., Inc.,

shall well and truly pay all costs that may be awarded against it on the appeal or on the dismissal thereof, not exceeding the penalty of this bond in the aggregate, then this bond shall be void; otherwise to remain in full force and effect.

Dated: April 30th, 1953.

NELSE MORTENSEN & CO., INC.,

By /s/ HERMAN HOWE,
One of Its Attorneys.

AMERICAN BONDING COMPANY OF BALTIMORE.

[Seal] By /s/ GUERTIN CARROLL,
Attorney in Fact.

[Endorsed]: Filed May 1, 1953.

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[Title of District Court and Cause.]

## STIPULATION

It Is Hereby Stipulated by and between Nelse Mortensen & Co., Inc., appellant, by its attorneys of record, and Kenneth M. Treadwell, Trustee, and Seattle Association of Credit Men, Inc., respondents, by their respective attorneys of records, that it shall not be necessary for the Clerk of the above-entitled court to forward to the Circuit Court of Appeals for the Ninth Circuit any portion of the file in the above-entitled matter. with the exception

of the documents and records designated in the "Designation of Contents of Record on Appeal" heretofore filed herein, together with the following additionl documents, which shall be included in the record on appeal, to wit:

1. Petition of Puget Sound Products Company for Relief under Chapter X of the Bankruptcy Act, filed February 2, 1951.

2. Order Approving Debtor's Petition under Chapter X of the Bankruptcy Act, made and entered February 3, 1951.

3. Order Appointing Trustee, made and entered January 21, 1952.

4. Bond of Trustee, filed February 15, 1952.

5. Order Increasing Bond of Trustee, made and entered March 13, 1952.

6. Additional Bond, filed March 18, 1952.

7. Inventory filed by Trustee with Referee-Special Master, showing date of filing thereof.

8. Appraisal filed with Referee-Special Master.

9. This Stipulation.

10. Statement of Points on which appellant, Nelse Mortensen & Co., Inc., intends to Rely on Appeal.

Dated this 26th day of May, 1953.

LYCETTE, DIAMOND & SYLVESTER,

Attorneys for Appellant, Nelse Mortensen & Co., Inc.

By /s/ HERMAN HOWE.

/s/ KENNETH S. TREADWELL,
Trustee for Puget Sound Products Company, a Corporation.

/s/ ALBERT M. FRANCO,
Attorney for Seattle Association of Credit Men, Inc.

[Endorsed]: Filed May 26, 1953.

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[Title of District Court and Cause.]

## INVENTORY

The following is a list of all known physical assets coming into the actual constructive possession of the Trustee in the above matter:

Cash ..... $8,430.50

Personal property located at Houghton, Washington, as per schedules attached.

One Bethleham 4 column upstroke Hydraulic Press (located in Chicago, Milwaukee, St. Paul freight yards at Tacoma, Washington.)

A royalty free, non-exclusive license to make, use and sell a pressboard known as "Gossite," as evidenced by a contract dated the 17th day of January, 1947, entered into between O.P.M. Goss and Worth C. Goss as Licensors and Puget Sound Products Co. as Licensee, and an agreement dated the 18th day of September, 1950, entered into between O. P. M. Goss and Worth C. Goss and United States

Sheetwood Company as Licensors, and Puget Sound Products Co. as Licensee; said licenses reportedly covering the following patents and patent applications:

1. 637,107 Sheetwood filed Dec. 22, 1945, Patent No. 2,485,587, issued Oct. 25, 1949.
2. 665,891 Sheet Lumber filed Apr. 29, 1946. Abandoned.
3. 680,838 Sheet Lumber and Method of its Manufacture, filed July 1, 1946. Abandoned.
4. 680,839 Method of Pressing Sheet Lumber, filed July 1, 1946. Allowed June 5, 1950.
5. 680,840 Method of Mixing Materials, filed July 1, 1946. Abandoned.
6. 688,590 Method of Manufacturing Sheet Lumber, filed Aug. 6, 1946.
7. 697,365 Sheet Lumber Press, filed Sept. 16, 1946.
8. 713,393 Wood Glue, filed Nov. 30, 1946. Allowed June 21, 1950.
9. 726,480 Method of Rapid Mfg. of Sheet Lumber, filed Feb. 5, 1947. Patent No. 2,480,851 issued Sept. 6, 1949.
10. 780,759 Reaction Base Material, filed Oct. 18, 1947.
11. 3,000 Method of Manufacturing Sheet Wood, filed Jan. 19, 1948.
12. 29,991 Wood Chip Flow Equalizer, filed May 29, 1948.
13. 29,992 Wood Fiberizing Machine, filed May 29, 1948.

14. 29,993 Method of Making Compressed Fiber Products, filed May 29, 1948.
15. 35,519 Method of Making Chemical Compounds, filed June 26, 1948.
16. 40,783 Method of Mfg. Fiber Products With Color, filed July 26, 1948.
17. 40,784 Wood Fiber Product and Method of its Manufacture, filed July 26, 1948.
18. 60,351 Multiple Platen Press, filed Nov. 16, 1948.
19. 98,759 Sheet Lumber and Method of its Manufacture, filed June 13, 1949.
20. 134,605 Compressed Fiber Product and Method of Mfg., filed Dec. 22, 1949.
21. 164,885 Method of and Apparatus for the Forming of Fiber Pads for Board Making, filed May 29, 1950.

(The Trustee, after diligent search, has been unable to locate an executed copy of the above contracts, but has in his possession unsigned copies thereof. Said contracts do not specifically enumerate the patents above referred to, however, the trustee's investigation discloses that the intent of the parties was to cover the foregoing patents.)

Dated this 19th day of March, 1952.

/s/ KENNETH S. TREADWELL,
Trustee.

Personal Property

Located at: Houghton, Washington: Puget Sound Products Company.

(In plant)

Production Line Steamer.
Chip Meter.
18″ Interplane Grinder (Allis-Chalmers).
26″ Interplane Grinder 2/motor (Allis-Chalmers).
26″ Interplane Grinder 2/motor (Allis-Chalmers).
Magnetic Starter (Allis-Chalmers).
Magnetic Starter (Allis-Chalmers).
Grinding Machine (Allis-Chalmers) w/motor.
Fibre Drier (rotary).
1—5′ x 12′ Allis-Chalmers Ripl-Flo Screens and Supports.
Traveling Belt.
Precompression Press.
Hydraulic Power Unit #BP 2010 D 113.
Dowtherm Boiler (Eclipse) w/motors & controls, #13422.
Dowtherm Boiler (Eclipse).
Dowtherm Boiler (Eclipse).
Drying Oven w/motor & controls.
Sterling type Water Tube Boiler.
Oscillating Spouts.
Separators.
Motorized Fans and Blowers.
Belt Conveyors.
Ducts and Pipe Work.
Conveyor Sections.
49″ 3-drum Sheboygan Sander w/4 motors.

#3 Beach Double Cut-Off Saw, Ser. #48F20.
Delta Tilting Table Circular Saw Ser. #61-1699.
Sundstrand Sander Model 1000-A #574-1A w/hose.
Electric Sump Pump.
Jaeger Sure Prime Pump w/motor.
IMA 330 Pump.
Pump and Tank.
Worthington Rotary Gear Pump.
Centrifugal Pump (American March) C80072.
3—2″ Gramco Pumps.
Worthington Gear Pump 490 RG 5.
3—Plastic Feeding Tanks.
420-gallon Tank.
60-gallon Tank.
425-gallon Tank 10 HP.
Allis-Chalmers Electric Motor, 10 HP, 713 D N-51435—1945.
Master Speedranger Electric Motor UH22033 ⅓ HP.
Allis-Chalmers 50 HP Electric Motor.
Allis-Chalmers 20 HP Electric Motor.
7½ HP Electric Motor.
Master Single Herringbone Gearhead Motor.
Single Worm Gearhead Motor.
Dunlap Electric Motor.
¼ HP Electric Motor.
¾ HP Electric Motor.
1 HP Electric Motor.
¼ HP Whirlaway Electric Motor.
¼ HP Electric Motor.
½ HP Westinghouse Electric Motor 118004.
¾ HP U. S. Suncrogear Electric Motor.

¼ HP Master Gearhead Motor.
10—5 KVA Capacitors.
Radial Drill w/motors.
Armstrong Grinder.
Dravo Heater #1817.
1-ton Budget Hoist.
1-ton Chain Block Hoist.
Forge.
3—Pipe Threaders.
Gardner Denver Air Compressor #101542.
Revolvator "Red Giant" Lift Truck N32910.
Hobart 300 amp. Portable Welder.
Hobart Arc Welder DW 18721.
Welding Machine Accessories.
44" New Haven Swing Lathe.
5# Fire Extinguisher.
Fibre Boxes.
3 Barkers.
Secondary Press.
2 Rotary Gear Pumps.
⅓ HP Electric Motor 451 15 R9.
2—2 HP Electric Motors N-51453 3676 & 2657.
1½" 9B Waterous Iron Pump.
Master Electric Motor ½ HP.
Electric Motor with Coupling #N-51453-2305.
Electric Motor ¼ HP W-2323018.
Oilgear 7½ HP Motor Driven Hydraulic Pump.
Vickers Oil Pump.
10-ton Bridge Crane.
Farquhar Press.
6—Jib Cranes.
Air Compressor.
3—G. E. 100 KVA Transformers.

3—Allis-Chalmers 50 KVA Transformers.
3—Pittsburgh Transformers 100 KVA)
3—G. E. " 200 KVA)
1 Maloney Transformer 75 KVA) 7 transformers.
Trumbull Electric Switchboard.
1 Baldor Grinder Ser. #P-13154.
1 Glenn-Roberts Arc Welder Mod. #20
Ser. #A1345.
1 Lot Wood Horses.
1 Marvel Draw Cut Metal Saw.
1 Lot Small Tools, consisting mainly of hammers, saws, wrenches, pliers, etc.
2 HP General Electric Electric Motor
5K 225 D45.
15-ton Bridge Crane.
1 1941 Ford ½-ton Truck Motor #18-5942595.
Cincinnati Bench Grinder Ser. #170161.
Property located at plant not covered by Seattle Association of Credit Men Mortgage:
3000# per sq. inch—60-gal. per min. Oil Pump.

Personal Property

Located at Houghton, Washington, Puget Sound Products Company.

(In plant laboratory)

Buffing Machine.
Craftmaster Belt Sander and Motor Ser. #103-0803.
½ HP Electric Motor B-Line Ser. #N2300566.
¼ HP Electric Motor.
Skill Drill No. 499932.

UFH Thor ¾" Drill Ser. #1023472.
¼ HP Grinder.
U. S. Reznor Heater.
Diagraph Stencil Machine 16A4339.
1 24 Standard Drafter Ser. #SN62482742.
Desk Lamp.

Office Furniture in plant laboratory

Stationery Cabinet (wood).
Typewriter Desk (oak).
Executive Desk (oak).
Steel Steno. Chair.
Royal Typewriter Ser. #KMM12-3581027.
Art Metal 4-Drawer File.
Walnut Desk and Swivel Chair.
2 Arm Chairs.
2 Straight-back Chairs.
F. & E. Check Protector Ser. #2981437.
Oak Table.
2 Costumers.
Located at Houghton, Washington, Outside Storage:
Sumner Iron Works Chipper (51") #1467.
Allis-Chalmers Motor (for chipper) 100 HP1200, RPM, Ser. #25200K-823E-1-1.
Compensator Starter for Chipper Motor 100 HP.
Chip Tank.
2 Airco Generators.
1 Chip Hydrator.
1 Lot Metal Racks.

[Endorsed]: Filed March 31, 1952, Referee.

[Endorsed]: Filed May 27, 1953, U.S.D.C.

[Title of District Court and Cause.]

## OATH OF APPRAISER AND APPRAISMENT

United States of America,
Western District of Washington—ss.

I, Neale Warne, having been notified of my appointment as appraiser in the above estate, do hereby make solemn oath that I will fully and fairly appraise the property of the estate consisting of machinery and equipment, according to my best skill and judgment.

/s/ NEALE WARNE.

Subscribed and Sworn to before me this 18th day of June, 1952.

[Seal] /s/ KENNETH S. TREADWELL,
Notary Public in and for the State of Washington,
Residing at Seattle.

### Appraisement

After strict examination and inquiry, I hereby appraise the machinery and equipment of the above estate, as shown on the schedules hereto attached.

/s/ NEALE WARNE.

[Description of property same as that attached to Findings of Fact and Conclusions of Law Upon Hearing of Show Cause Order Directed to Nelse Mortensen & Co., Inc., filed in Referee's office January 12, 1953.]

[Endorsed]: Filed June 24, 1952, Referee.
[Endorsed]: Filed May 27, 1953, U.S.D.C.

[Title of District Court and Cause.]

## ORDER DIRECTING EXHIBITS TO BE SENT TO CIRCUIT COURT OF APPEALS

It Appearing to the Court that Nelse Mortensen & Co., Inc., has appealed from certain Orders entered herein on April 6, 1953, and that the original exhibits hereinafter mentioned should be sent to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on said appeals;

It Is Hereby Ordered that the Clerk of this Court be and he is hereby authorized and directed to forward by registered mail to the Clerk of the United States Court of Appeals for the Ninth Circuit the following original exhibits, to wit: Exhibits Nos. 1 to 20, inclusive, received in evidence at the hearing of the above-entitled matter held before the Referee-Special Master on November 17, 1952, and Exhibits Nos. 1 to 4, inclusive, received in evidence at the hearing of said matter held before the Referee-Special Master on December 22, 1952.

Dated this 29th day of May, 1953.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

LYCETTE, DIAMOND & SYLVESTER,
By /s/ HERMAN HOWE,
Attorneys for Nelse Mortensen & Co., Inc.

Approved:

/s/ KENNETH S. TREADWELL,
Trustee for Puget Sound
Products Company.

/s/ ALBERT M. FRANCO,
Attorney for Seattle Association of Credit Men, Inc.

[Endorsed]: Filed May 29, 1953.

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 38838

In the Matter of

PUGET SOUND PRODUCTS COMPANY, a Corporation

IN PROCEEDINGS IN THE REORGANIZATION OF A CORPORATION

Be It Remembered, That on the 17th day of November, 1952, the above-entitled cause came regularly on for hearing before the Hon. Van C. Griffin, Referee in Bankruptcy, at Room 601, U. S. Court House, Seattle.

Appearances:

MR. KENNETH S. TREADWELL,
As Trustee in Reorganization;

MR. ALBERT M. FRANCO, and
MR. LEOPOLD M. STERN,
Attorneys for Claimant, Seattle Association of Credit Men;

MR. JOSEF DIAMOND, and
MR. HERMAN HOWE, of
LYCETTE, DIAMOND & SYLVESTER,
Attorneys for Claimant, Nelse E. Mortensen & Co., Inc.

Whereupon, the following proceedings were had and done, to wit:

The Referee: It is my understanding that the record here shows that the trustee in the matter of the Puget Sound Products Co. filed a petition upon which the Referee issued an order directing Nelse Mortensen & Co., Inc., to appear and set forth any claim it may have against said property situated upon the plant formerly owned by the Puget Sound Products Company at Houghton; that in response to that claim, Nelse Mortensen & Co., Inc., filed an answer setting forth its claim to that property, and it happened to be in here on the same day that the report of the Seattle Association of Credit Men were here, and they had some matter pending here as to their interest in said property, and by agreement between the trustee and the representative of Nelse Mortensen & Co. and the Seattle Association of Credit Men the matter was set down for hearing at this time. Are the parties ready? [2*]

* * *

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Howe: I will have these certified copies marked as exhibits, please.

(Certified copies of papers marked Mortensen's Exhibits 1, 2, 3, 4 and 5 were marked for identification.)

Mr. Howe: I will first offer in evidence certified copy of warranty deed from Lake Washington Shipyards to the Defense Plant Corporation, marked for identification Mortensen's Exhibit No. 1, dated June 19, 1941.

Also, as Mortensen's Exhibit 2, certified copy of the purchase money mortgage from Puget Sound Products Company to the Reconstruction Finance Corporation, dated May 14, 1948.

Mr. Franco: Is that just a real estate mortgage, counsel?

Mr. Howe: Purchase money mortgage, it is headed.

As Exhibit No. 3 the quit claim deed of the same date, December 16—deed dated December 16, 1947, and apparently acknowledged on May 14, 1948, from the Reconstruction Finance Corporation to the Puget Sound Products Company, a corporation, which has been marked for identification as Exhibit 3.

As Mortensen's Exhibit No. 4, I offer a certified copy of proceedings in the case of United States of America, [5] plaintiff, vs. Puget Sound Products Company, a Washington corporation, and others, being Cause No. 2479 of the United States District Court, and for the Western District of Washington,

Northern Division. A large number of documents are included in that certified copy of the foreclosure proceedings.

And as Exhibit No. 5 I will offer in evidence the original United States Marshal's deed on foreclosure in the same case from the United States Marshal to Nelse Mortensen & Company, Inc., a Washington corporation, dated January 21, 1952; and in that connection I would like to ask permission of the Court to substitute for this original deed a certified copy thereof.

The Referee: That will be granted.

There being no objection, they will be admitted.

(Documents above referred to were received in evidence as Mortensen's Exhibits 1, 2, 3, 4 and 5.)

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## MORTENSEN EXHIBIT No. 1

### Warranty Deed

The Grantor, Lake Washington Shipyards, a corporation organized under the laws of the State of of Washington, for and in consideration of the sum of Fourteen Thousand Three Hundred Seventy-Nine & 94/100 ($14,379.94) Dollars, in hand paid, conveys and warrants to Defense Plant Corporation, a corporation created pursuant to and by virtue of an Act of Congress entitled "Reconstruction Finance Corporation Act," approved January 22, 1932, as amended, the following described real estate,

designated as Parcels One, Two, Three and Four, situated in the County of King, State of Washington, and more particularly described as follows:

* * *

[Description of real estate.]

In Witness Whereof, said corporation has caused this instrument to be executed by its proper officers and its corporate seal to be hereunto affixed this 19th day of June, 1941.

[Seal] LAKE WASHINGTON SHIPARDS

By /s/ (Illegible)
President;

By /s/ (Illegible)
Secretary.

[Acknowledgement in regular form.]

State of Washington,
County of King—ss.

I, Robert A. Morris, Auditor of King County, State of Washington, and ex officio Recorder of Deeds, and the legal keeper of the records hereinafter mentioned, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a Warranty Deed Aud. Rec. No. 3173077, as recorded in this office in Vol. 1977 of Deeds, Page 55, Records of King County.

Witness my hand and official seal this 12th day of November, 1952.

[Seal] ROBERT A. MORRIS,
Auditor of King County,
Washington.
By /s/ HUNTER SEWELL,
Deputy.

No. 9894

Received in evidence November 17, 1952.

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MORTENSEN EXHIBIT No. 2

Purchase Money Mortgage

This Indenture made as of the 16th day of December, 1947, between Puget Sound Products Company, a corporation existing under and by virtue of the laws of the State of Washington, with its principal place of business in the City of Houghton, Washington, herein called Mortgagor, and Reconstruction Finance Corporation, a corporation duly organized and existing under and by virtue of the laws of the United States, which corporation has succeeded, pursuant to the provisions of Public Law 109, 79th Congress, approved June 30, 1945, to all of the rights and assets of Defense Plant Corporation, acting by and through War Assets Administration, under and pursuant to Reorganization Plan One of 1947 (12 Fed. Reg. 4534), and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765), and War Assets Administration Regulation No. 1, as amended, herein called Mortgagee;

WITNESSETH

That Mortgagor has purchased from the Mortgagee all right, title, and interest of Mortgagee in and to the real property hereinatfer described and to secure the unpaid balance of the purchase price in the amount hereinafter stated, does hereby mort- and to the real property hereinafter described and property situated in the County of King, State of Washington, to wit:

* * *

[Description of real estate.]

In Witness Whereof, the Mortgagor has caused this instrument to be executed by its proper officers and its corporate seal to be hereunto affixed this 14th day of May, 1948.

[Seal] PUGET SOUND PRODUCTS COMPANY,

By /s/ O. P. M. GOSS,
President.

Attest:

/s/ W. L. GRILL,
Secretary.

[Acknowledgment in regular form.]

State of Washington,
County of King—ss.

I, Robert A. Morris, Auditor of King County, State of Washington, and ex officio Recorder of Deeds, and the legal keeper of the records herein-

after mentioned, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a Purchase Money Mortgage Aud. Rec. No. 3802885, as recorded in this office in Vol. 2367 of Mtgs., Page 31, Records of King County.

Witness my hand and official seal this 12th day of November, 1952.

[Seal] ROBERT A. MORRIS,
Auditor of King County, Washington.
By /s/ HUNTER SEWELL,
Deputy.

No. 9896

Received in evidence November 17, 1952.

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MORTENSEN EXHIBIT No. 3

3802884

Quitclaim Deed

This Indenture, made as of the 16th day of December, 1947, between Reconstruction Finance Corporation, a corporation duly organized and existing under and by virtue of the laws of the United States, which corporation has succeeded, pursuant to the provisions of Public Law 109, 79th Congress, approved on June 30, 1945, to all the rights and assets of Defense Plant Corporation, acting by and through War Assets Administration, under and pursuant to Reorganization Plan One of 1947 (12 Fed. Reg. 4534), and the powers and authority contained in the provisions of the Surplus Property

Act of 1944 (58 Stat. 765); and War Assets Administration Regulation No. 1, as amended, hereinafter called the party of the first part, and Puget Sound Products Company, a corporation existing under and by virtue of the laws of the State of Washington, with its principal place of business in the City of Houghton, Washington, hereinafter called the party of the second part,

Witnesseth: That the party of the first part, for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration to it duly paid by the party of the second part, the receipt of which is hereby acknowledged, conveys and quitclaims to party of the second part, its successors and assigns, all interest in the following described property situate in the County of King, State of Washington, to wit:

* * *

[Description of real estate.]

Party of the first part further conveys and quitclaims to party of the second part, its successors and assigns, all interest in the following described personal property, machinery and equipment:

1—45-ton Whirley Crane.
1—15-ton Bridge Crane.
1—10-ton Bridge Crane.
1—7½-ton Bridge Crane.
1—350-ton Joggling Press.
2—Acetylene Generators.
1—Auxiliary Fire Pump.

1—Worthington Air Compressor.
114—Bending and Welding Slabs with stools.
6—Jib Cranes.
1—Trumbull Switchboard
13—Transformers:
3—200 KVA—DPC Nos. 403-7, 403-8, 403-9.
6—100 KVA—DPC Nos. 403-13, 403-14, 403-15, 403-22, 403-28, 403-31.
1— 75KVA—DPC No. 403-21.
3— 50KVA—DPC Nos. 403-18, 403-19, 403-20.

Said land, buildings, structures, improvements and personal property, machinery and equipment were duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and War Assets Administration Regulation No. 1, as amended.

To Have and to Hold the said premises with the appurtenances, unto said party of the second part, its successors and assigns, forever, except the fissionable materials and rights excepted and reserved above, and under and subject to the reservations, rights, restrictions and conditions set forth in this instrument.

* * *

In Witness Whereof, the party of the first part has caused these presents to be executed as of the day and year first above written.

RECONSTRUCTION FINANCE CORPORATION, Acting by and Through WAR ASSETS ADMINISTRATION.

By /s/ J. SHELDON LOWERY
Deputy Regional Director, Real Property Disposal,
War Assets Administration.

Witnesses:
/s/ MARGARET COVER,
/s/ FRANCES M. STEVENSON.

State of Washington,
County of King—ss.

I, Robert A. Morris, Auditor of King County, State of Washington, and ex officio Recorder of Deeds, and the legal keeper of the records hereinafter mentioned, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a Quitclaim Deed Aud. Rec. No. 3802884, as recorded in this office in Vol. 2745 of Deeds, Page 134, Records of King County.

Witness my hand and official seal this 12th day of November, 1952.

[Seal] ROBERT A. MORRIS,
Auditor of King County,
Washington.

By /s/ HUNTER SEWELL,
Deputy.

No. 9895

Received in evidence November 17, 1952.

MORTENSEN EXHIBIT No. 4

In the United States District Court in and for the Western District of Washington, Northern Division

Civil No. 2479

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PUGET SOUND PRODUCTS COMPANY, a Washington Corporation; SEATTLE ASSOCIATION OF CREDIT MEN, a Washington Corporation; STATE OF WASHINGTON; UNKNOWN OWNERS, Being All Other Persons or Parties Unknown or Having or Claiming Any Right, Title, Interest, Estate or Lien in the Property and Rights to the Property Described in the Complaint Herein,

Defendants.

APPEARANCE

To the Clerk of the Above-Entitled Court:

You will please enter the appearance of the undersigned as attorney for Defendant, Seattle Association of Credit Men, a Washington corporation.

/s/ WHEELER GREY.

[Endorsed]: Filed Mar. 10, 1950.

Mortensen Exhibit No. 4—(Continued)

[Title of District Court and Cause.]

No. 2479

## AMENDED COMPLAINT

Comes Now the plaintiff, United States of America, by its undersigned attorneys, at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the General Services Administrator, and for first cause of action complains and alleges as follows:

I.

That the Reconstruction Finance Corporation is a corporation duly organized and existing under and by virtue of the laws of the United States, which corporation has succeeded, pursuant to the provisions of Public Law 109, 79th Congress, approved June 30, 1945, to all of the rights and assets of Defense Plant Corporation; and War Assets Administration, pursuant to Reorganization Plan One of 1947 (12 Fed. Reg. 45340), and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765), and War Assets Administration Regulation No. 1, as amended, was duly authorized to act by and for said Reconstruction Finance Corporation. That by Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress, effective June 30, 1949, the functions, obligations and commitments of the War Assets Administration were

Mortensen Exhibit No. 4—(Continued)

transferred to the General Services Administration, an Agency of the Executive Branch of the Government, and War Assets Administration was abolished.

II.

That the defendant, Puget Sound Products Company, is a corporation existing under and by virtue of the laws of the State of Washington with its principal place of business in the City of Houghton, King County, Washington.

III.

That jurisdiction of this cause is conferred upon this Court by Sections 1345 and 1392, Title 28, United States Code.

IV.

That on the 16th day of December, 1947, the defendant, Puget Sound Products Company, a Washington corporation, made, executed and delivered to the War Assets Administration, acting for and on behalf of the Reconstruction Finance Corporation, a Promissory Note in writing in the principal amount of $38,361.60, a copy of which note is attached hereto and marked Exhibit A and made a part hereof.

V.

That at the same time with the execution and delivery of said Promissory Note and as a part of the same transaction, said defendant, Puget Sound Products Company, a Washington corporation, in

Mortensen Exhibit No. 4—(Continued)

order to secure the payment of said Promissory Note and of the moneys and interest therein provided and agreed to be paid, made, executed and delivered to the Reconstruction Finance Corporation, acting by and through the War Assets Administration, a certain instrument designated Purchase Money Mortgage, by which said defendant mortgaged to the Reconstruction Finance Corporation, acting by and through the War Assets Administration, all that certain real property situate in King County, Washington, and described as follows:

* * *

together with the buildings, structures and improvements located thereon; said mortgage dated December 16, 1947, was on May 17, 1948, recorded in Volume 2367 of Mortgages, Page 31, under Auditor's File No. 3802885, records of King County, Washington, and that defendant, Puget Sound Products Company, named therein as mortgagor, was on said dates the owner of the above-described property.

VI.

That the plaintiff, United States of America, is the owner and holder of the herein-described note and mortgage, and no other action has been taken or is pending for the collection or enforcement of plaintiff's rights thereunder.

VII.

That the defendants named herein have or may have some right, title, lien or interest in or to the

Mortensen Exhibit No. 4—(Continued)

property described herein: but the right, title, claim, lien or interest of said defendants and each of them is inferior to the rights of the plaintiff under said note and purchase money mortgage.

VIII.

That default has been made in the payment of the herein-described Promissory Note and no part of the principal sum or interest due thereon on December 16, 1948, and December 16, 1949, has been paid and the whole of the principal sum of said note with interest as provided therein is immediately due and payable and is owing and unpaid: that default has been made by defendant by failure to pay taxes to King County, Washington, for the years 1948 and 1949 prior to delinquency or at all. That plaintiff has demanded payment of said note.

IX.

That defendant, Puget Sound Products Company, has failed to repay to plaintiff tax advancements made by plaintiff to King County, Washington, on delinquent taxes pursuant to the terms of said mortgage, in the amount of $3.387.88 for 1948 taxes paid on June 20, 1949, and for the first half of the taxes for 1949 in the amount of $788.22 paid on June 20, 1949; that the total sum of such advancements, $4,176.10, together with interest thereon at 6% per annum from date of advancement is due and owing, and said advancement, together with interest are secured by said mortgage.

Mortensen Exhibit No. 4—(Continued)

X.

That by the terms of said mortgage it is provided that if any action be commenced to foreclose said mortgage, the mortgagee is entitled, in addition to all other sums of money otherwise recoverable and costs of suit, the following items:

(a) Such sum as the Court may consider reasonable as attorneys' fees in such action.

(b) All sums expended in securing title searches and reports preliminary to foreclosure.

(c) All amounts expended in preserving, protecting, marshalling, or recovering, or retaining possession of any property therein mortgaged.

(d) All fees incurred in recording notices of lis pendens and all other appropriate notices.

(e) All other sums, of whatsoever nature, reasonably expended by the mortgagee in the enforcement or protection of the rights and remedies thereby given.

Second Cause of Action

As an additional and second cause of action, at the direction of the Attorney General, pursuant to the request of the Commissioner of Internal Revenue, the plaintiff complains and alleges as follows:

XI.

That the Commissioner of Internal Revenue duly

Mortensen Exhibit No. 4—(Continued)

assessed the following taxes, penalties and interest against defendant, Puget Sound Products Company, a Washington corporation:

| Lien No. | Tax | Period | Amount of Lien | Date Assess. List Rec'd. | Date Notice of Tax Lien Filed |
|---|---|---|---|---|---|
| 14849 | WHT | 3/31/49 | $2010.19 | 8/29/49 | 9/16/49 |
| 14849 | WHT | 6/30/49 | 2262.15 | 8/29/49 | 9/16/49 |
| 14849 | FICA | 3/31/49 | 636.91 | 9/ 2/49 | 9/16/49 |
| 14849 | FICA | 6/30/49 | 655.60 | 9/ 2/49 | 9/16/49 |
| 15920 | WHT | 9/30/49 | 1167.46 | 12/27/49 | 1/ 3/50 |
| 15920 | FICA | 9/30/49 | 295.08 | 12/27/49 | 1/ 3/50 |

XII.

That after receipt of said assessment list as stated in Paragraph XI above, the Collector of Internal Revenue for the District of Washington duly demanded payment of said taxes but the said Puget Sound Products Company neglected and refused to pay the same or any part thereof, and that all of said taxes together with interest as provided by law and filing fees in the sum of $1.00 are still due, outstanding and unpaid.

XIII.

That on the various dates set forth in Paragraph XI above, pursuant to the provisions of Sections 3670, 3671 and 3672 of the Internal Revenue Code (26 USCA 3670, 3671 and 3672), the Collector of Internal Revenue for the District of Washington caused to be filed with the County Auditor of King County, Washington, and with the Clerk of the United States District Court on various other dates,

Mortensen Exhibit No. 4—(Continued)

notice of tax liens covering the taxes assessed and outstanding as set forth in Paragraph XI above.

XIV.

That under and by virtue of the Internal Revenue Laws of the United States the United States acquired liens against the property described herein.

XV.

That the above-described tax liens are junior to the purchase money mortgage lien of plaintiff described in the first cause of action herein, but are paramount to the rights and claims which the above-named defendants, or some of them, have or may have in the property described herein.

Wherefore, on account of its first cause of action, plaintiff prays for judgment against Puget Sound Products Company, a Washington corporation, in the sum of Thirty-eight Thousand Three Hundred Sixty-one and 60/100 Dollars ($38,361.60), with interest from December 16, 1947, at the rate of 4% per annum, and in the sum of Four Thousand One Hundred Seventy-six and 10/100 Dollars ($4,176.10) for advancements to King County, Washington, on account of delinquent taxes, together with interest thereon at the rate of 6% per annum from the date of advancement, and for such sum for attorneys' fees as the Court deems reasonable, and for costs of sale and plaintiff's costs and disbursements herein, including any expense incurred in this action and listed in Paragraph X above, and on account of its

Mortensen Exhibit No. 4—(Continued)

second cause of action prays for judgment against defendant, Puget Sound Products Company, in the total amount of the above-described tax liens and filing fees, together with interest as provided by law from the dates the assessment lists were received by the Collector of Internal Revenue for the District of Washington, as alleged herein, and

Further, prays that said judgment provide as follows:

1. That in case of non-payment of said judgment forthwith after entry, the total amount of said judgment will bear interest at 6% per annum until paid, and

2. That said judgment for said amounts due under said note and purchase money mortgage is a first and paramount lien on the real estate described in said mortgage and is superior to any right or claim of defendants, and

3. That said judgment for said amount due under said tax liens be adjudged to be a lien against the property described herein, and

4. That said premises be sold to satisfy said judgment and costs of sale, and that the United States Marshal for the Western District of Washington shall sell said lands pursuant to the judgment and according to the law and practice of the Court after due notice pursuant to the law, and

5. That upon sale of said property to satisfy the liens of plaintiff distribution of proceeds of such

Mortensen Exhibit No. 4—(Continued)

sale be made according to the findings of this Court, first to satisfy the purchase money mortgage judgment lien of plaintiff and the balance to satisfy all the tax liens of the United States and other defendants as their rights may appear, and

6. That said defendants and all persons claiming under them subsequent to the execution of said mortgage upon the premises be forever foreclosed of all rights therein, save the statutory redemption for one year after said sale as provided by law, and

7. That plaintiff be permitted if it so desires to bid and purchase at said sale, and

8. That the purchaser at said sale be let into immediate possession of said property upon confirmation of said sale and have the use and enjoyment thereof to the time of any redemption, and

Further prays for such other and general relief as to the Court may seem equitable.

UNITED STATES OF AMERICA,

By /s/ J. CHARLES DENNIS,
United States Attorney;

/s/ ALEEN HOGSHIRE,
Special Attorney,
Department of Justice.

Mortensen Exhibit No. 4—(Continued)

State of Washington,
County of King—ss.

Aleen Hogshire, being first duly sworn, on oath deposes and says:

That she is a Special Attorney, Department of Justice, and one of the attorneys for plaintiff; that she has read the foregoing complaint, knows the contents thereof and believes the same to be true.

/s/ ALEEN HOGSHIRE.

Subscribed and Sworn to before me this 23rd day of June, 1950.

[Seal] /s/ VAUGHN E. EVANS,
Notary Public in and for the State of Washington, Residing at Seattle.

Copy Received June 23, 1950, and consent to filing granted.

JONES, BIRDSEYE & GREY,
Attorneys for Defendant, Puget Sound Products Company, a Washington Corporation.

/s/ WHEELER GREY,
Attorney for Defendant, Seattle Association of Credit Men, a Washington Corporation.

[Endorsed]: Filed June 23, 1950.

Mortensen Exhibit No. 4—(Continued)

[Title of District Court and Cause.]

No. 2479

## MOTION FOR ORDER OF DEFAULT

Comes Now the plaintiff, United States of America, by its undersigned attorneys, and moves the Court for entry of an Order of Default against the defendant, Seattle Association of Credit Men, a Washington corporation.

This motion is based on the files and records herein and on the affidavit of Aleen Hogshire attached hereto.

Dated at Seattle, Washington, this 4th day of August, 1950.

UNITED STATES OF AMERICA,

By /s/ J. CHARLES DENNIS,
United States Attorney;

/s/ ALEEN HOGSHIRE,
Special Attorney,
Department of Justice.

Copy Received this 4th day of August, 1950.

By /s/ WHEELER GREY,

Wheeler Grey, Attorney for Defendant, Seattle Association of Credit Men, a Washington Corporation.

[Endorsed]: Filed Aug. 4, 1950.

Mortensen Exhibit No. 4—(Continued)

State of Washington,
County of King—ss.

Aleen Hogshire, being first duly sworn, on oath deposes and says:

That she is a Special Attorney, Department of Justice, and as such, one of the attorneys for plaintiff in the above-entitled case. That she makes this affidavit in support of plaintiff's motion for an order of default against the defendant, Seattle Association of Credit Men, a Washington corporation.

That the defendant, Seattle Association of Credit Men, a Washington corporation, was duly and regularly served with summons and complaint on March 1, 1950, as appears from the Marshal's return of service on file herein. That on March 10, 1950, the appearance of Wheeler Grey as attorney for defendant, Seattle Association of Credit Men, was filed with the Clerk of this Court and a copy of said appearance served on the attorneys for plaintiff. That no answer to the complaint has been filed herein.

That on June 23, 1950, an amended complaint was filed herein and a copy of said amended complaint was served on the attorney of record for said defendant on the same date, receipt for which service is endorsed on the amended complaint on file herein. That no answer to said amended complaint has been filed herein.

Mortensen Exhibit No. 4—(Continued)

That the defendant, Seattle Association of Credit Men, a Washington corporation, has not filed or served any pleading in this case and is now in default for its failure so to do.

/s/ ALEEN HOGSHIRE.

Subscribed and Sworn to before me this 4th day of August, 1950.

/s/ JOHN E. BELCHER,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed Aug. 4, 1950.

[Title of District Court and Cause.]

No. 2479

ORDER OF DEFAULT

This Cause coming on regularly for hearing this day on motion of plaintiff, United States of America, for an order of default against the defendant, Seattle Association of Credit Men, a Washington corporation, and it appearing to the Court that said defendant has been duly and regularly served with summons and complaint on March 1, 1950, as appears from the Marshal's return of service on file herein, and that the attorney for said defendant

Mortensen Exhibit No. 4—(Continued)

was duly served with a copy of the amended complaint filed herein on June 23, 1950, and it further appearing to the Court that no answer to the complaint or amended complaint has been filed herein by or on behalf of said defendant, and it appearing to the Court proper that an order of default be entered against said defendant and the Court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered and Adjudged that the defendant, Seattle Association of Credit Men, a Washington corporation, be and it is hereby adjudged to be in default in the above-entitled action and default is hereby entered against said defendant.

Done in Open Court this 5th day of Sept., 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Presented by:

/s/ ALEEN HOGSHIRE,
Special Attorney,
Department of Justice.

[Endorsed]: Filed Sept. 5, 1950.

Mortensen Exhibit No. 4—(Continued)

[Title of District Court and Cause.]

No. 2479

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause coming on duly and regularly for hearing in open Court on the 5th day of September, 1950, before the Honorable Peirson M. Hall, United States District Judge, sitting without a jury, the plaintiff being represented by J. Charles Dennis, United States Attorney, and Aleen Hogshire, Special Attorney, Department of Justice; the defendant, Puget Sound Products Company, a Washington corporation, being represented by Storey Birdseye of Jones, Birdseye and Grey, its attorneys, and no other persons or parties appearing and an order of default having been heretofore entered against defendants, Seattle Association of Credit Men, a Washington corporation, for failure to answer herein, and the State of Washington, for failure to appear or answer herein, and neither of said defendants having appeared at the trial of this case, and the Court having heard the evidence herein and being fully advised in the premises, now makes the following

### Findings of Fact

I.

That this case was instituted by the filing of a

Mortensen Exhibit No. 4—(Continued)

complaint at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the General Services Administrator, to foreclose a purchase money real estate mortgage described therein which secures a debt owed to the United States of America by the defendant, Puget Sound Products Company, a Washington corporation, and on June 23, 1950, an amended complaint was filed herein incorporating the allegations of the original complaint and containing second cause of action, at the request of the Commissioner of Internal Revenue to enforce tax liens described therein and have the sums due on account of said taxes adjudged to be a lien against said property described therein, and for general relief.

II.

That jurisdiction of this case is conferred upon this Court by Sections 1345 and 1392, Title 28, U.S.C., and jurisdiction of the parties hereto has been obtained by due service of process as appears from the Marshal's returns on file.

First Cause of Action

III.

That on December 16, 1947, the defendant, Puget Sound Products Company, a Washington corporation, made, executed and delivered to the War Assets Administration, acting for and on behalf of the Reconstruction Finance Corporation, a promis-

Mortensen Exhibit No. 4—(Continued)

sory note in writing in the principal amount of $38,361.60, which note is in evidence herein and marked as Exhibit 1. That at the time of execution and delivery of said promissory note, the defendant, Puget Sound Products Company, made, executed and delivered that certain instrument designated Purchase Money Mortgage, filed herein as Exhibit 2, covering all of the property described therein and more particularly described in Exhibit A attached hereto and by this reference made a part hereof, together with buildings, structures and improvements located thereon, and said mortgage dated December 16, 1947, was on May 17, 1948, recorded in Volume 2367 of Mortgages, Page 31, Auditor's File No. 3802885, records of King County, Washington, and that the defendant, Puget Sound Products Company, named therein as mortgagor, was on said dates the owner of said above-described property.

IV.

That the plaintiff is the owner and holder of the above-described note and mortgage, and no other action has been taken or is pending for the collection or enforcement of plaintiff's rights thereunder.

V.

That no part of the principal sum or interest due on said promissory note on December 16, 1948, and December 16, 1949, has been paid, and plaintiff has declared and elected by the filing of its complaint herein that the whole of the principal sum of said

Mortensen Exhibit No. 4—(Continued)

note and interest became immediately due and payable; that defendant, Puget Sound Products Company, failed to pay taxes due King County, Washington, for the years 1948 and 1949 prior to delinquency or at all and has failed to repay to plaintiff tax advancements made by plaintiff to King County, Washington, on delinquent taxes pursuant to the terms of said mortgage in the amount of $3,387.88 for 1948 taxes paid on June 20, 1949, and for the first half of 1949 taxes in the amount of $788.22 paid on June 20, 1949, and the total amount of said advancements, the sum of $4,176.10, together with interest at 6% from date of payment, are owing, and said advancement and interest are secured by said mortgage.

VI.

That by the terms of said mortgage it is provided that if any action be commenced to foreclose said mortgage, the mortgagee is entitled, in addition to all other sums of money otherwise recoverable and costs of suit, to the following items:

(a) Such sum as the Court may consider reasonable as attorney's fees in such action.

(b) All sums expended in securing title searches and reports preliminary to foreclosure.

(c) All amounts expended in preserving, protecting, marshalling, or recovering or retaining possession of any property therein mortgaged.

(d) All fees incurred in recording notices of lis pendens and all other appropriate notices.

Mortensen Exhibit No. 4—(Continued)

(e) All other sums, of whatsoever nature, reasonably expended by the mortgagee in the enforcement or protection of the rights and remedies thereby given.

VII.

That the sum of $500.00 is a reasonable attorney fee to be allowed the plaintiffs herein, and the sum of $26.50 is a reasonable sum to be allowed the plaintiff for cost incurred in securing title search and report preliminary to foreclosure. That the sum of $1.60 was the cost to the plaintiff on account of filing notice of the pendency of this action in the records of King County, Washington, said notice of Lis Pendens being filed on February 28, 1950, Volume 67, Page 347 of Judgments, Auditor's File No. 3989165.

VIII.

That there is now due, owing and unpaid to the plaintiff upon its note and mortgage the following sums:

| | |
|---|---|
| The principal sum of $38,361.60 with interest at 4% per annum from December 16, 1947, to September 5, 1950, in the amount of $4,332.46 | $42,694.06 |
| Tax advancements to King County, Washington, in the amount of $4,176.10 with interest at 6% per annum from June 20, 1949, to September 5, 1950, in the amount of $304.11 | 4,480.21 |
| Attorney fees | 500.00 |

Mortensen Exhibit No. 4—(Continued)

| | |
|---|---|
| Brought Forward | $47,674.27 |
| Title search | 26.50 |
| Filing Lis Pendens | 1.60 |
| Total | $47,702.37 |

IX.

That the defendants named herein have or may have some right, title, lien or interest in or to the property described herein; but the right, title, claim, lien or interest of said defendants and each of them is inferior to the rights of the plaintiff under said note and purchase money mortgage.

Second Cause of Action

X.

That the Commissioner of Internal Revenue duly assessed the following taxes, penalties and interest against defendant, Puget Sound Products Company, a Washington corporation:

| Lien No. | Tax | Period | Amount of Lien | Date Assess. List Rec'd. | Date Notice of Tax Lien Filed |
|---|---|---|---|---|---|
| 14849 | WHT | 3/31/49 | $2010.19 | 8/29/49 | 9/16/49 |
| 14849 | WHT | 6/30/49 | 2262.15 | 8/29/49 | 9/16/49 |
| 14849 | FICA | 3/31/49 | 636.91 | 9/ 2/49 | 9/16/49 |
| 14849 | FICA | 6/30/49 | 655.60 | 9/ 2/49 | 9/16/49 |
| 15920 | WHT | 9/30/49 | 1167.46 | 12/27/49 | 1/ 3/50 |
| 15920 | FICA | 9/30/49 | 295.08 | 12/27/49 | 1/ 3/50 |

XI.

That after receipt of said assessment list as stated in Paragraph X above, the Collector of Internal Revenue for the District of Washington duly de-

Mortensen Exhibit No. 4—(Continued)

manded payment of said taxes, but the said Puget Sound Products Company neglected and refused to pay the same or any part thereof, and that all of said taxes together with interest as provided by law and filing fees in the sum of $1.00 are still due, outstanding and unpaid.

XII.

That on the various dates set forth in Paragraph X above, pursuant to the provisions of Sections 3670, 3671 and 3672 of the Internal Revenue Code (26 U.S.C.A. 3670, 3671 and 3672), the Collector of Internal Revenue for the District of Washington caused to be filed with the County Auditor of King County, Washington, and with the Clerk of the United States District Court on various other dates, notice of tax liens covering the taxes assessed and outstanding as set forth in Paragraph X above.

XIII.

That under and by virtue of the Internal Revenue Laws of the United States the United States acquired liens against the property described herein.

XIV.

That the above-described tax liens are junior to the purchase money mortgage lien of plaintiff described in the first cause of action herein, but are paramount to the rights and claims which the above-named defendants, or some of them, have or may have in the property described herein.

Mortensen Exhibit No. 4—(Continued)

From the foregoing findings of fact the Court deduces the following

Conclusions of Law

I.

That this Court has jurisdiction of the subject matter of this action and of the parties hereto.

II.

That the herein-described note and mortgage securing the same and the interest, and sums thereunder required to be paid, are now in default of payment. That the sums due and owing under said note and purchase money mortgage are a first and paramount lien on the property described herein.

III.

That there is due to plaintiff from and plaintiff is entitled to judgment herein against Puget Sound Products Company, a Washington corporation, by virtue of said note and mortgage, in the amount of $38,361.60 principal with interest at 4% per annum from December 16, 1947, to September 5, 1950, in the amount of $4,332.46, and in the sum of $4,176.10, together with interest at 6% from date of advancement to September 5, 1950, in the amount of $304.11, and for title search and filing costs in the amount of $28.10, and for attorney's fees in the amount of $500.00, making a total of $47,702.37.

IV.

That there is due to plaintiff from defendant,

Mortensen Exhibit No. 4—(Continued)

Puget Sound Products Company, the sum of $7,027.39, plus interest as provided by law, on account of internal revenue taxes, and for filing fees in the sum of $1.00, and plaintiff is entitled to judgment against said defendant for said amounts, and said judgment is a lien on the property described herein.

V.

That plaintiff, United States of America, is entitled to foreclose under said mortgage in this action any and all rights, title, lien, claim or interest of the defendants and to have said real property sold in this proceeding, free and clear of all liens and encumbrances of defendants, by the Marshal under the order and practice of this Court, and the proceeds, if any, of such sale after payment of necessary costs should be distributed as follows:

1. To payment of the purchase money mortgage judgment lien of plaintiff.
2. To payment of tax lien judgment of plaintiff.
3. If any balance of said proceeds remains, to defendants as their rights may appear.

**VI.**

That such sale should be subject to such rights of redemption as are provided by law. That the plaintiff is entitled to become the purchaser at said sale and make payment or settlement with the United States Marshal by applying the sum adjudged due plaintiff herein, or any part thereof, in payment of the purchase price of said property:

Mortensen Exhibit No. 4—(Continued)

and that the purchaser at said sale should be let into immediate possession of said property upon confirmation of said sale and have the use and enjoyment thereof to the date of any redemption, and that the claims of any defendants are subordinate, inferior and subsequent to the liens, claim and judgment of plaintiff herein.

Done in Open Court this 5th day of September, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Presented by:

/s/ ALEEN HOGSHIRE,
Special Attorney,
Department of Justice.

Copy Received and Approved as to Form:

JONES, BIRDSEYE & GREY,
Attorneys for Puget Sound
Products Co.

[Endorsed]: Filed Sept. 5, 1950.

Mortensen Exhibit No. 4—(Continued)

In the District Court of the United States for the Western District of Washington, Northern Division

No. 2479

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PUGET SOUND PRODUCTS COMPANY, a Washington Corporation; SEATTLE ASSOCIATION OF CREDIT MEN, a Washington Corporation; STATE OF WASHINGTON, et al.,

Defendants.

## JUDGMENT AND DECREE

This Cause coming on duly and regularly for hearing in open Court on the 5th day of September, 1950, before the Honorable Peirson M. Hall, United States District Judge, sitting without a jury, the plaintiff being represented by J. Charles Dennis, United States Attorney, and Aleen Hogshire, Special Attorney, Department of Justice; the defendant, Puget Sound Products Company, a Washington corporation, being represented by Storey Birdseye of Jones, Birdseye and Grey, its attorneys, and no other person or parties appearing and an order of default having been heretofore entered against defendants, Seattle Association of Credit Men, a Washington corporation, and the State of

Mortensen Exhibit No. 4—(Continued)

Washington, for failure to appear or answer herein, and neither of said defendants having appeared at the trial of this case, and the Court having heretofore made and entered its findings of fact and conclusions of law herein,

Now, Therefore, in Conformity Therewith, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the plaintiff, United States of America, be and it is hereby awarded judgment against the defendant, Puget Sound Products Company, a Washington corporation, in the amount of Thirty-eight Thousand Three Hundred Sixty-one and 60/100 Dollars ($38,361.60), together with interest at 4% per annum from December 16, 1947, to September 5, 1950, in the amount of Four Thousand Three Hundred Thirty-two and 46/100 Dollars ($4,332.46), and in the amount of Four Thousand One Hundred Seventy-six and 10/100 Dollars ($4,176.10) on account of tax advancements to King County, Washington, together with interest at 6% per annum on said sum from June 20, 1949, to September 5, 1950, in the amount of Three Hundred Four and 11/100 Dollars ($304.11), and for title search and filing fees in the amount of Twenty-eight and 10/100 Dollars ($28.10), and for attorney fees in the amount of Five Hundred and no/100 Dollars, making a total of Forty-seven Thousand Seven Hundred Two and 37/100 Dollars ($47,702.37) and costs to be taxed by the clerk of this Court.

Mortensen Exhibit No. 4—(Continued)

2. That on its second cause of action plaintiff, United States of America, is hereby awarded judgment against defendant, Puget Sound Products Company, a Washington corporation, in the amount of Seven Thousand Twenty-seven and 39/100 Dollars ($7,027.39), together with interest as provided by law and filing fee of One and no/100 Dollars ($1.00).

3. That the plaintiff, United States of America, has a valid and subsisting first, prior and paramount lien for the amount of its judgment, as described in Paragraph 1 above, on and against the property described in Exhibit A attached hereto and by this reference made a part hereof, and said lien is hereby foreclosed.

4. That the plaintiff, United States of America, has a valid lien, junior to said purchase money mortgage lien, against the property described herein on account of its judgment for tax liens as set forth in Paragraph 2 above, and said lien is hereby foreclosed.

5. That any right, title, lien, claim or interest of any other person or party hereto are inferior, subsequent and subordinate to the judgment for the amounts due under said note and purchase money mortgage, and all claims or rights of said defendants against the herein described property are hereby forever foreclosed.

6. That the above-described real estate and the

Mortensen Exhibit No. 4—(Continued)

whole thereof be sold to satisfy plaintiff's judgment herein and costs of sale, said sale being free from liens and encumbrances of any kind or nature, subject to such right of redemption as is provided by law, and that such sale be conducted by the United States Marshal at the South (Jefferson Street) entrance of the King County Court House at Seattle, Washington, on October 21st, 1950, at the hour of 10:00 o'clock a.m., after due notice of said sale has been published and proper notices thereof posted as provided by law, to the highest bidder for cash; that the Marshal do advertise said sale and terms thereof by publication in the Daily Journal of Commerce, a daily newspaper in Seattle, once a week for four weeks next preceding the date of said sale; that said sale shall be subject to confirmation by the Court; that the plaintiff is hereby authorized to become a purchaser at said sale and to bid the amount of the aforesaid judgments for said property and to make payment or settlement with the United States Marshal by applying the sum adjudged due plaintiff or any part thereof in payment of the purchase price of said property; that a certified copy of this judgment and decree be delivered by the clerk of this Court to the United States Marshal and said copy shall constitute the authority of the United States Marshal to advertise and make said sale and to incur all necessary costs of advertising and posting notices of said sale as herein directed;

Mortensen Exhibit No. 4—(Continued)

that any other party may become a purchaser at said sale; that the purchaser at said sale be let into immediate possession of said proporty upon confirmation of said sale and have the use and enjoyment thereof to the date of any redemption; that the total amount of the judgments granted plaintiff herein shall bear interest at 6% per annum if not paid forthwith after entry; that upon the sale of the real estate herein described being fully completed the proceeds, if any, of said sale shall be applied as follows:

1. To the costs of sale.

2. To payment of the purchase money mortgage judgment lien of plaintiff.

3. To payment of tax lien judgment of plaintiff.

4. The surplus, if any, to the defendants herein, entitled thereto.

7. That this Court retains jurisdiction of this cause for entry of such further orders as may be necessary.

Done in Open Court this 5th day of September, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Presented by:

/s/ ALEEN HOGSHIRE,
Special Attorney, Department of Justice.

Mortensen Exhibit No. 4—(Continued)

Copy received and approved as to form.

JONES BIRDSEYE & GREY,
Attorneys for P. S. Products Co.

[Endorsed]: Filed September 5, 1950.

[Title of District Court and Cause.]

No. 2479

ORDER CONFIRMING SALE

This Cause coming on for hearing on motion of plaintiff for an order confirming the sale of real estate hereinafter described made on the 21st day of October, 1950, by the United States Marshal in and for the Western District of Washington, pursuant to judgment and decree of mortgage foreclosure entered September 5, 1950, in this action, appointing the United States Marshal to make such sale and to follow and obey the direction of said decree, and it appearing to the Court that on October 21, 1950, said mortgaged real estate, situate in King County, Washington, and more particularly described as follows:

* * *

[Description of real estate.]

was sold by said United States Marshal for the sum of $47,702.37 to the United States of America, plaintiff; and it further appearing to the Court that

Mortensen Exhibit No. 4—(Continued)

pursuant to said decree and order the United States Marshal advertised said mortgaged property to be sold at public auction at the South (Jefferson Street) entrance of the King County Court House in Seattle, Washington, on the 21st day of October, 1950, at 10:00 o'clock a.m., and the United States Marshal prior to said sale caused due and legal notice thereof to be published and posted in the manner required by said decree; that the United States Marshal attended at the time and place fixed for said sale and exposed said mortgaged property for sale in one parcel to the highest and best bidder for cash; that the United States of America, the above-named plaintiff, was the highest and best bidder therefor, and the said mortgaged property was struck off by the United States Marshal to the United States of America, for the sum of $47,702.37, which was the whole price bid therefor, and the highest price bid therefor, and that the United States Marshal filed his report and return of sale on the 23rd day of October, 1950, and more than ten (10) days have elapsed since said report and return was filed with the clerk of this Court; that no objections have been filed to said sale, and that the said sale was in all respects duly and regularly made, and that the decree and order of the Court entered on the 5th day of September, 1950, has been complied with; that the amount bid is a just and fair sum to be paid for said property at said sale, and it appearing that there is no reasonable probability that the said property could be sold for a

Mortensen Exhibit No. 4—(Continued)

larger sum; that there are no reasons why said sale should not be confirmed;

Now, Therefore, It is Hereby Ordered that said sale made by the United States Marshal on the 21st day of October, 1950, of the mortgaged property described in the decree, to the United States of America for the sum of $47,702.37 be, and the same is in all respects duly confirmed, approved and allowed, and that the United States Marshal be and he is authorized to issue to the United States of America a certificate of purchase in accordance with said decree and in accordance with law, and

It Is Further Ordered that the United States of America be let into immediate possession of said property from the date of entry of this order and have the use and enjoyment thereof to the date of any redemption.

Done in Open Court this 15th day of November, 1950.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ ALEEN HOGSHIRE,
Special Attorney, Department of Justice.

[Endorsed]: Filed November 15, 1950.

Mortensen Exhibit No. 4—(Continued)

[Title of District Court and Cause.]

No. 2479

## ASSIGNMENT OF CERTIFICATE OF REDEMPTION

Know All Men by These Presents that the undersigned, Seattle Association of Credit Men, a corporation, for a valuable consideration to it in hand paid, receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto Nelse Mortensen & Co., Inc., a corporation, that certain certificate of redemption of real estate issued on November 26, 1951, by J. S. Denise, United States Marshal for the Western District of Washington, to Seattle Association of Credit Men, a corporation, for that certain real estate situated in the County of King, State of Washington, particularly described in said certificate of redemption, which was sold by the United States Marshal for the Western District of Washington, on October 21, 1950, to United States of America, and which was redeemed by the undersigned on the 5th day of November, 1951, upon payment of the sum of $50,710.84, being the full amount of the purchase price paid for said property, including interest at the rate of 8% per annum, up to the time of redemption; and the undersigned does hereby, sell, assign, transfer, convey and quit claim to the said Nelse Mortensen & Co., Inc., a corporation, all of its rights under and by

Mortensen Exhibit No. 4—(Continued)

virtue of said certificate of redemption, together with all of its interest in and to the real estate described in said certificate of redemption, including the right to demand and receive deed for said real estate from the United States Marshal for the Western District of Washington.

In Witness Whereof the said Seattle Association of Credit Men, a corporation, has caused this instrument to be executed by its proper officers, and its corporate seal to be hereto affixed this 30th day of November, 1951.

[Seal] SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation.

By /s/ G. C. HOLDEN,
President,

By /s/ C. P. KING,
Secretary.

State of Washington
County of King—ss.

On this 30th day of November, A.D., 1951, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn personally appeared G. C. Holden and C. P. King, to me known to be the President and Secretary, respectively, of Seattle Association of Credit Men, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for

Mortensen Exhibit No. 4—(Continued)

the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

[Seal] /s/ E. V. GRISVARD,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed January 21, 1952.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 2479

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PUGET SOUND PRODUCTS COMPANY, a Washington Corporation;

SEATTLE ASSOCIATION OF CREDIT MEN, a Washington Corporation, et al,
Defendants.

ORDER

This Matter coming on for hearing on motion of plaintiff, United States of America, for an order

Mortensen Exhibit No. 4—(Continued)

approving the United States Marshal's deed on foreclosure, and directing payment of the sum of $50,710.84 now on deposit in the registry of this Court on account of the redemption of the property described in said deed from foreclosure sale, which was ordered and confirmed by orders of this Court, and the Court having considered said motion and the files and records herein and the affidavit of counsel, and it appearing to the Court that all of the recitals in the form of Marshal's deed attached to said motion are true, and it further appearing to the Court that on November 30, 1951, the Seattle Association of Credit Men, a corporation, duly executed and delivered to Nelse Mortensen & Co., Inc., a corporation, an Assignment of Certificate of Redemption, which has been presented and filed herein, and that the said Nelse Mortensen & Co., Inc., a corporation, is now entitled to Marshal's deed for the real estate described in the form of deed attached to said motion, and the Court being now fully advised in the premises,

Now, Therefore, It is Hereby Ordered that the United States Marshal be and he is hereby directed to issue a United States Marshal's deed on foreclosure to the said Nelse Mortensen & Co., Inc., a corporation, substantially in the form attached to the motion on file herein, but containing recital of the execution and delivery of the Assignment of Certificate of Redemption dated November 30, 1951, from the Seattle Association of Credit Men, a cor-

Mortensen Exhibit No. 4—(Continued)

poration, to Nelse Mortensen & Co., Inc., a corporation, which Assignment of Certificate of Redemption has been filed herein, and

It Is Further Ordered that the Clerk of this Court be and he is hereby directed to pay to the Treasurer of the United States of America the sum of $50,-710.84 now on deposit in the registry of this Court in full payment for redemption of said property from said foreclosure sale made on October 21, 1950.

Done in Open Court this 21st day of January, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved as to form:

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

Presented by:

LYCETTE, DIAMOND & SYLVESTER,

By /s/ HERMAN HOWE,

Attorneys for Seattle Association of Credit Men and Nelse Mortensen & Co., Inc.

Received check No. 8769 this 23rd day of January, 1952.

/s/ J. CLARK DENNIS,
United States Attorney.

[Endorsed]: Filed January 21, 1952.

Mortensen Exhibit No. 4—(Continued)

CERTIFIED COPY

United States of America
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court in and for the Western District of Washington, do hereby certify that the annexed and foregoing is a true and full photostatic copy of the original

Appearance of Wheeler Grey for Seattle Association of Credit Men, Amended Complaint,

Motion for Order of Default (Seattle Association of Credit Men),

Order of Default (Seattle Association of Credit Men),

Findings of Fact and Conclusions of Law,

Judgment and Decree,

Order Confirming Sale,

Assignment of Certificate of Redemption,

Order directing issuance of Marshal's deed on foreclosure,

in Cause No. 2479, entitled United States of America, Plaintiff, vs. Puget Sound Products Company, a Washington corporation; Seattle Association of Credit Men, a Washington corporation, et al, Defendants, now remaining among the records of the said Court in my office.

Mortensen Exhibit No. 4—(Continued)

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Seattle, this 13th day of November, A.D. 1952.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy Clerk.

Received in evidence November 17, 1952.

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MORTENSEN EXHIBIT No. 5

No. 4204844

UNITED STATES MARSHAL'S DEED ON FORECLOSURE

No. 2479

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PUGET SOUND PRODUCTS COMPANY, a Washington Corporation;

SEATTLE ASSOCIATION OF CREDIT MEN, a Washington Corporation, et al,
Defendants.

This Indenture made this 21st day of January, 1952, between J. S. Denise, United States Marshal

Mortensen Exhibit No. 5—(Continued)

in and for the Western District of Washington, and the Nelse Mortensen & Co., Inc., a Washington corporation,

Witnesseth:

Whereas, on February 28, 1950, Cause No. 2479, United States of America, Plaintiff vs. Puget Sound Products Company, a Washington corporation, and Seattle Association of Credit Men, a Washington corporation, et al, Defendants, was instituted in the United States District Court for the Western District of Washington, Northern Division, to foreclose the mortgaged premises therein described, and

Whereas, on September 5, 1950, said Court made and entered in said Cause then pending a decree of foreclosure and order of sale and appointed and directed said United States Marshal to sell the said mortgaged premises which were described in said decree, and are more particularly hereinafter described, at public auction at 10:00 a.m. on the 21st day of October, 1950, in the manner prescribed by law, and

Whereas, under and by virtue of said decree and order of sale, a certified copy of which was on the 7th day of September, 1950, duly issued and delivered to said Marshal, the same constituting his authority and command to make sale of said premises therein described, the said Marshal on the 21st day of October, 1950, duly sold the said premises, subject to confirmation by said Court, to the United States of America for the sum of $47,702.37, and

Mortensen Exhibit No. 5—(Continued)

Whereas, the said Court did on the 15th day of November, 1950, make an order confirming said sale and directing certificate of purchase to be issued to the United States of America, the purchaser at said sale; said order of confirmation and certificate are now of record in the Clerk's office of said Court, and

Whereas, on October 19, 1951, prior to expiration of one year after the date of said sale, defendant, Seattle Association of Credit Men, a Washington corporation, filed with said Marshal a "Notice of Intention to Redeem and Demand for Verified Statements of Rents Received and Paid" and submitted to said Marshal evidence of its right to redeem said property consisting of a certified copy of real estate mortgage in trust dated July 7, 1949, and recorded July 8, 1949, in Volume 2513 of Mortgages, page 648, records of King County, Washington, under Auditor's File No. 3917161, together with an affidavit showing the amount actually due on said mortgage to be the sum of $67,065.53, said instruments now being of record in the clerk's office of said Court, and

Whereas, on October 31, 1951, the purchaser, United States of America, who had been entitled to possession of said premises from and after entry of order confirming sale on November 15, 1950, filed with the United States Marshal a "Statement of Purchaser's Bid and Interest Due" and "Statement of Rents and Profits Received and Expenses Paid

Mortensen Exhibit No. 5—(Continued)

and Incurred," as amended, whereby the redemption price was duly certified to be the sum of $50,-710.84, including interest at 8% from date of sale as provided by law, said instrument now being of record in the clerk's office of said Court, and

Whereas, said Seattle Association of Credit Men, a Washington corporation, on the 5th day of November, 1951, paid to the United States Marshal said sum of $50,170.84 on account of the redemption of said property, and said sum was on November 26, 1951, deposited in the registry of said Court by said Marshal, and

Whereas, a certificate of redemption was duly issued, and a copy delivered to said redemptioner by said Marshal, and filed by the United States Marshal with the clerk of said Court on November 26, 1951, and

Whereas, on November 30, 1951, the Seattle Association of Credit Men assigned the said certificate of redemption to Nelse Mortensen & Co., Inc., a corporation, which assignment of certificate of redemption has been filed herein; and

Whereas, more than one year has expired after the date of said sale and no other redemption has been made or notice given operating to extend the period of redemption,

Mortensen Exhibit No. 5—(Continued)

Now, Therefore, the said J. S. Denise, United States Marshal in and for the Western District of Washington, for and in consideration of said sum of $50,710.84, to him paid by said redemptioner, Seattle Association of Credit Men, a Washington corporation, the receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by this instrument does grant, bargain, sell and convey to Nelse Mortensen & Co., Inc., a Washington corporation, and its assigns the following described premises, situate in King County, Washington:

* * *

[Description of real estate.]

together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

In Witness Whereof said United States Marshal has hereunto set his hand the date and year first above written.

/s/ J. S. DENISE,
United States Marshal for the Western District of Washington.

Signed in the Presence of:

/s/ JOHN E. BELCHER,

/s/ MARION C. SINCLAIR.

Filed for Record Kings County, Washington, 1952.

Received in evidence November 17, 1952.

The Referee: I assume that those certified copies fairly completely show the assignment from the Seattle Association of Credit Men to the Mortensen Company?

Mr. Howe: That is included in the mortgage foreclosure proceedings.

Mr. Franco: Is that included in this Exhibit 4?

Mr. Howe: Yes.

I will call Mr. Goss as an adverse witness. [6]

WORTH C. GOSS

called as an adverse witness in behalf of Nels E. Mortensen & Co., being first duly sworn, testified as follows:

Direct Examination

By Mr. Howe:

Q. What is your full name?

A. Worth C. Goss.

Q. And do you now have any connection with the Puget Sound Products Company, a corporation?

A. I do.

Q. And what is that?

A. I am vice-president of the company.

Q. Have you been connected with this company ever since it acquired the property at Lake Washington Shipyards which was later purchased under mortgage foreclosure sale by Nels Mortensen? [7]

* * *

Q. (By Mr. Howe): I understand, Mr. Goss, you were connected with this corporation at the time it purchased the property from the United

(Testimony of Worth C. Goss.)

States of America? A. I was.

Q. At the time this property was purchased by the Puget Sound Products Company, which was approximately in December, 1947, was that correct?

A. December 16 I believe. [8]

Q. 1947, was there located on that property a building? A. There was.

Q. And in connection with that building was there any equipment in and attached to the building at the time that it was purchased?

A. Certainly.

* * *

Q. (By Mr. Howe): At the time this property was purchased by Puget Sound from the United States in December, 1947, were there two cranes located in the building on the property? [9]

* * *

(Question read.)

A. Yes.

Q. (By Mr. Howe): Are those cranes the same ones that are in the building now?

A. There was three cranes there.

Q. Are two of those cranes the two that are in the building now? A. That is correct.

Q. And at the time this building was purchased by the Puget Sound Products Company was there located on the property a switchhouse with transformers and electric wiring for the building?

Mr. Franco: The same objection, your Honor.

The Referee: Same ruling.

(Testimony of Worth C. Goss.)

A. It is impossible to answer that question as phrased.

Q. (By Mr. Howe): Well, was there a switch house located on the property at that time?

A. The terminology is incorrect, I believe.

Q. Where were the transformers located upon the premises at the time it was purchased by the Puget Sound Products Co? [10]

A. There were no transformers on the premises.

Q. Where were the transformers?

A. On various pieces of United States government property distributed around the Northwest.

Q. You mean to say there were no transformers in or about the building on the premises at the time the Puget Sound Products Company purchased it?

A. There might possibly have been one or two, but the transformers under question were not on the premises, that is as a complete item. They were assembled by the Puget Sound Products Company from other locations, principally.

Q. At the time the mortgage was given, purchase money mortgage was given back to the Reconstruction Finance Company listing the transformers, were they located on or about the premises at that time?

A. I do not believe so, to the best of my knowledge.

Q. Was the building wired for electricity?

A. There was a certain amount of wiring in the

(Testimony of Worth C. Goss.)

building, yes, which I believe was considered part of the real estate.

Q. Was there located on the real estate acquired by Puget Sound Products Company a substation of the electric company, Puget Sound Power & Light Company? A. No, there was not.

Q. Is there one there now? [11]

A. There is one there now.

Q. When was that put in?

A. It was put in subsequent to the deed that was spoken of, acquired by the Puget Sound Products Company.

Q. When was it put in?

A. I couldn't give the exact date. Request was made to put in a substation shortly after the deed was acquired.

Mr. Howe: Will you mark this as an exhibit, Mortensen Exhibit?

(Diagram was marked Mortensen Exhibit No. 6 for identification.)

Q. I am going to hand you, Mr. Goss, a document marked Mortensen's Exhibit No. 6 for identification, and ask you to examine that, and ask you have you seen that instrument before?

A. Yes, I have.

Q. Was that instrument in your possession and obtained by you at about the time that you acquired the property—that the Puget Sound Products Company acquired the property from the United States?

(Testimony of Worth C. Goss.)

A. This document did not represent the property fully as acquired by us at that time. [12]

* * *

Mr. Howe: Will you please read the last question for my information?

(Question read.)

Q. Repeating that question again, Mr. Goss, did you obtain the document which is marked Exhibit No. 6 from the United States of America about the time the United States sold this property to Puget Sound Products Company? A. Yes.

Q. And I understand from your voluntary statement made when I first asked the question, that you claim that the plan does not—Mortensen's Exhibit No. 6—is incorrect in some respects as to the property which you acquired? A. That is correct.

Q. This plan shows a power——

The Referee: I think if you are going to refer to the contents of that you should offer it in evidence.

Mr. Howe: I will offer in evidence Mortensen's Exhibit No. 6 for identification.

* * *

The Referee: Oh, I will allow it in evidence. It will be admitted.

(Diagram was received in evidence as Mortensen's Exhibit No. 6.) [13]

Q. (By Mr. Howe): Referring to the plan

(Testimony of Worth C. Goss.)

which is marked as Mortensen's Exhibit No. 6, which shows a power substation adjoining the building on these premises, is that power substation substantially as shown thereon now located on the premises?

A. That question cannot be answered by yes or no.

Q. No? Answer the question.

A. The substation as shown on this drawing was presumably a complete substation. The government, prior to sale to Puget Sound Products Company, dismantled that substation and sold the parts piecemeal, one section of which was sold and listed on this chattel mortgage under the terminology of switch panels.

Q. The substation then, as I understand you, was located on the property at the time the Puget Sound Products Co. purchased it?

A. I believe there is a question of terminology there. The thing that we bought was called a transformer vault. It is a little building made of concrete, that was there, that was on the property and is still on the property and I believe is part of the real estate.

Q. But the substation itself you think was not on the property?

A. It had been partially dismantled.

Q. Was it restored afterwards? [14]

A. The Puget Sound Products Company restored it.

Q. Now the building that you mention, in which

(Testimony of Worth C. Goss.)

the transformers were located, was located on the property? A. That is correct.

Q. Was there located on the property a forge in one corner of the building as shown by this plan, at the time Puget Sound Products Company bought the building?

A. I would have to see the plan again.

(Mr. Howe hands exhibit to the witness.)

A. (Continuing): Where is the item you refer to? (Indicating). No, there was no forge located on the property when purchased by Puget Sound Products Company.

Q. Is there one located there now?

A. Well, there is a small portable forge that you lift with hooks that I have had built myself at a later date.

Q. Now these thirteen transformers which you gave a mortgage—which the Puget Sound Products Company gave a mortgage on, or which were included in the deed and bill of sale to the Puget Sound Products Company, when were they placed upon the property?

A. I had a crew of men working on that shortly after the transfer of the property. I believe that was December 16, 1947. We hired a company known as the Watson Electric Company to do that work and to place those transformers and to put the wires and so on connecting them up. [15]

Q. How long after you bought the property were they affixed to the property?

(Testimony of Worth C. Goss.)

A. Well, they are not fixed to the property yet.

Mr. Treadwell: I object to that, your Honor. He says "fixed" to the property.

A. They are still not fixed to the property. They just stand there.

Q. Is the switchboard which was in the property, was that there at the time Puget Sound Products Company got it?

A. One of the items we obtained a bill of sale for, it is a chattel. That was there at the time.[16]

* * *

Q. Now referring to these two cranes again: What size are those cranes, Mr. Goss?

A. One is a 15-ton crane and one is a 10-ton crane.

Q. Do they run on tracks, elevated tracks?

Mr. Franco: I want to interpose the same objection, that all this is incompetent, irrelevant and immaterial under our theory.

A. Yes, they are on crane runway standards.

Q. (By Mr. Howe): And what are they used for in the premises?

A. The purpose of such machines is to lift anything that is underneath them.

Q. Transport it from one portion of the building to the other?

A. Possibly. The cranes are on wheels, as an automobile is on wheels. [18]

Q. Is there a platform constructed, an elevated

(Testimony of Worth C. Goss.)

platform constructed, in connection with the cranes?

A. Yes, there is a small platform that——

* * *

(Whereupon, at 12:05 p.m., an adjournment was taken until 2:00 o'clock p.m. of the same day.) [19]

November 17, 1952, 2:10 P.M.

WORTH C. GOSS

resumed the stand for

Direct Examination
(Continued)

By Mr. Howe:

Q. Mr. Goss, with reference to the heating system which is now in the building we are talking about, when was this heating system put in?

A. This was shortly after the building was acquired. It was acquired as the heater for the——

Q. Just a minute. Please answer the questions. When was this put in?

A. About January, I think, of 1948.

Q. And who put it in?

A. The Puget Sound Products Company.

Q. With reference to the fire protection system, was this in the building at the time it was purchased by the Puget Sound Products Company?

A. I believe the entire fire protection system

(Testimony of Worth C. Goss.)

was sold as part of the real estate. It was in at the time.

Q. Has anything been added to it since it was in?

A. It had no connection with the supply of water, and the Puget Sound Products Company paid $800 for a double pipe connection with the Kirkland Water system. [20]

Q. Now what comprises this fire protection system? Is there a pump in connection with it?

A. No. The company was forced to purchase the pump separately.

Q. Well, is this used in the fire protection system?

A. It is auxiliary, yes; it is auxiliary protection.

Q. When was this put in, this pump?

A. Well, it was inoperative when the company purchased it, and we put that into service, I think about—the pipes were broken around the pump. We put that into service about March of 1948.

Q. And in connection with that system is there a compressor which regulates the water pressure or something of that kind?

A. We put in a small compressor which is still someplace on the premises. I don't know just where it is at this time.

Q. And is the fire protection system for the building and for the dock all one system?

A. I believe they are separate.

Q. Were they both installed before Puget Sound purchased the property? A. Yes.

Q. I believe you testified this morning about

(Testimony of Worth C. Goss.)

this Trumbull electric switchboard. Did you say that was in before the property was purchased? [21]

A. Yes.

Q. Is it still in the same location it was?

A. Yes. The electric company which we hired did some rewiring on it, but it still is standing in the same position.

Q. Now with reference to these transformers that you testified were purchased, have any new transformers been put in since Puget Sound purchased the property except the ones that you testified were purchased about the same time?

Mr. Treadwell: That is a little bit hard for me to understand, the question.

Q. (By Mr. Howe): I just asked if any other transformers were put in the property except the ones that are described in the quit claim deed from the Reconstruction Finance Corporation?

A. Yes, there have been several.

Q. And who were they put in by?

A. The Puget Sound Products Company put in several of them, and the Puget Sound Power & Light Company put in several of them. The Puget Sound Power & Light Company has put in a substation on the—it is now on the property. Prior to our purchase, the Puget Sound Power & Light substation was not on the property.

Q. Did the Puget Sound Products Company own any part of the equipment which was located in the substation, or did that belong to the Puget Sound Power & Light Company?

(Testimony of Worth C. Goss.)

A. Part of that equipment is Puget Sound Power & Light [22] Company. The Puget Sound Products Company purchased the Trumbull switchboards that are in that, what is listed as the substation, on your exhibit. And then later the Puget Sound Products Company installed additional transformers in that same vault, which is listed as a substation on your exhibit.

Q. Do you know how many transformers there are now on the property?

A. I can enumerate them by order. There is one lighting transformer, and three hundred-kilowatt transformers, and three two-hundred kilowatt power transformers, and three one-hundred watt, 220 power transformers, and three five-hundred kilowatt transformers. The three five-hundred kilowatt transformers are in the substation, put there by the Puget Sound Power & Light Company.

Q. Did the Puget Sound Products Company have title to those two that were located there, or do they belong to Puget Sound Power?

A. So far as I know, while they are on the property, we never attempted to claim title to them.

Q. Now what other machinery and fixtures—machinery or fixtures, I will put it that way—were located on this property at the time the Puget Sound Products Company bought it from the United States?

A. The list was rather extensive. The building and the fire protection system, that is the elaborate piping system [23] for fire protection, and the

(Testimony of Worth C. Goss.)

toilets, were all there, and I believe were counted as part of the real estate.

Q. Was any extension to the building constructed by the Puget Sound Products Company to house some of the generators or equipment?

A. Yes, the Puget Sound Products Company constructed three extensions. One is on the west side of the building under discussion, which now houses a boiler. One is on the east side, which houses one of the diatherm boilers owned by the company; and one is across the road from the main building, and that houses the chipping equipment.

Q. How were these buildings constructed? Are they concrete? Frame buildings? Or what?

A. Well, I don't know the exact technical term. They are constructed of wood and timbers with aluminum surfacing, aluminum siding.

Q. What kind of foundation do they have?

A. I am not certain of that.

Q. It it concrete foundation?

A. Without looking at them, I can't remember whether they were put on blocks, or whether an actual foundation was put there. I am not sure.

Q. Was part of the side of the building taken out to extend the building, to include these additions?

A. I am not entirely certain of that. I don't believe [24] that—if the building siding was changed it was in a minor way. You should understand that the building was open, it was a shed when

(Testimony of Worth C. Goss.)

we purchased it, so that when we put this extension against the side, we simply didn't fill that portion up. The Puget Sound Products Company did complete the siding of the building.

Q. What are these boilers—you say two of these buildings were constructed to house boilers?

A. Yes.

Q. What were these boilers used for?

A. Well, they are boilers that are part of the company equipment, to make boards with, and heat the plate presses. [25]

* * *

Q. Mr. Goss, referring to Mortensen's Exhibit No. 3, which is the quit claim deed from the Reconstruction Finance Corporation to the Puget Sound Products Company, there is on page 4 a list of certain property referred to which I believe you testified, with the exception of some of the transformers, was in the premises. Was there any other machinery and equipment besides that that was in the premises at the time it was purchased? [26]

* * *

The Witness: Would you restate the question?

Q. (By Mr. Howe): My question was, speaking generally, was there any other machinery or equipment located in the premises at the time Puget Sound Products Company purchased it from the United States, in addition to that which is listed on the exhibit which you have in your hand?

A. Yes.

(Testimony of Worth C. Goss.)

Q. What did that consist of?

A. There were several buried oil tanks that were simply buried under the ground and had no connection to anything. In addition there was the power wiring and starting switches for all these machines, which were presumedly sold complete. I believe that can be found under lists elsewhere, when the government offered to sell this personal property. And those power switches and wiring and so on are still with the [27] machinery that is at the plant.

Q. Now let me ask you this: In the cranes, are there motors in the cranes themselves?

A. The cranes are completely self-contained truck units. That is, they move right along with everything needed to make them move, just like an electric truck.

Q. Are the motors for those cranes listed separately, do you know, in your list of property?

A. I believe the government listing was something like that.

Q. I am not asking you about the government listing, Mr. Goss. I am asking you if the motors in those cranes are some of the electric motors which you and the receiver have stated to the Court are listed in the——

A. (Interrupting): No, no, the cranes are listed as a complete unit, a complete truck unit.

Q. Then there is no listing of separate motors?

A. No, not on the cranes. That is a total and complete unit in each case.

Q. Now after the Puget Sound Products Company bought the property, what machinery and

(Testimony of Worth C. Goss.)

equipment was installed in the buildings by the Puget Sound Products Company? [28]

* * *

Q. There are three boilers listed here, diathem boilers, Eclipse. What are they?

A. That is equipment designed for heating board presses.

Q. Are some of those boilers the ones you referred to that were put in the additions to the building?

A. One of the boilers was put in the east addition, the other two are standing on the floor in the plant.

Q. When were they put in?

A. I believe around sometime during the year 1948. [30]

* * *

Q. Well, when were these boilers put in the premises?

A. To the best of my memory, sometime during the year 1948. Possibly one of them was a little later than that, although I am not certain of that.

Q. Were all of them put in by the Puget Sound Products Company? A. Yes.

Q. Maybe you can answer this, Mr. Goss: Was any of this [31] equipment put in the building after the foreclosure of the mortgage by the United States, the real estate mortgage?

A. I think possibly certain minor items were.

Q. Well, which ones?

(Testimony of Worth C. Goss.)

A. From memory it would be impossible to say. It is a vast piece of equipment, various makes of equipment. [32]

* * *

Mr. Howe: That is all.

Cross-Examination

By Mr. Treadwell:

Q. Mr. Goss, will you describe this building at the time you purchased it from the War Assets Administration?

A. It was called a steel shed or templet shed. And the sides on the north end of the building were not covered. They were open to the weather. And the property is approximately 90 feet wide and 300 feet long.

Q. And how many walls did it have?

A. It had a fairly complete south wall and a fairly complete east wall. Not fully complete.

Q. The north wall and the west wall were open?

A. The north and west walls were at least partially [33] open.

Q. Did you purchase this property from the War Assets Administration pursuant to an invitation to bid circulated by the War Assets Administration?

A. Yes.

Q. Handing you what has been marked as as Trustee's Exhibit 7, I will ask you to state what that is.

(Testimony of Worth C. Goss.)

A. That was an invitation by the War Assets Administration of the federal government to bid on some real estate, which is the property under discussion, and also on some personal property of various kinds.

Mr. Diamond: May I see it, please?

Q. (By Mr. Treadwell): I am just asking you to state what it is. That is the invitation to bid?

A. Yes.

Q. That invitation was received by the Puget Sound Products Company?

A. One of the Puget Sound Products Company employees obtained that, I believe, from the War Assets Administration.

Q. And pursuant to that invitation you submitted bids? A. Yes.

Mr. Treadwell: I am offering Trustee's 7. [34]

* * *

(Document was received in evidence as Trustee's Exhibit No. 7.)

(Testimony of Worth C. Goss.)

TRUSTEE'S EXHIBIT No. 7

War Assets Administration
Office of Real Property Disposal
McDermott Building
1409 Second Avenue
Seattle 1, Washington

WAA Disposal No. RSE-PD-10O

Bid No. .....

Invitation for Bids
for Sale or Lease of Surplus Real Property
Facilities and Personal Property

Including Instructions, Terms and Conditions and Forms for Bidding

Invitation

Bids will be received for the purchase or lease of certain surplus real property facilities hereinafter described until 4:30 p.m. (PST), October 20, 1947, from Federal Governmental Agencies and State or Local Governments, and from all others until 10:00 a.m. (PST), November 5, 1947, and then publicly opened and read at the office of War Assets Administration, McDermott Building, 1409 Second Avenue, Seattle 1, Washington.

Location and Description

The real property offered for sale or lease is that

(Testimony of Worth C. Goss.)

portion of the Lake Washington Shipyards, owned in fee by the Government, located at Houghton, Washington, two (2) miles south of Kirkland, Washington, on the east shore of Lake Washington, and is suitable for shipbuilding, ship repair, ship moorage, steel fabrication, manufacturing or various other small marine industries.

There are approximately 280,000 square feet of property with adjoining shore lands upon which there is a building and improvements, hereinafter described. (Note: All descriptions subject to final survey.)

General Description of Facilities

Land: Approximately 400′ x 700′ with adjoining shore land.

Building: Steel fabricating building, 87′ x 300′, ceiling height 41′, mill type, heavy wood construction, concrete pier foundation, corrugated steel siding, composition roof. Building constructed in 1940.

Craneways: Two craneways, 34′ x 490′.

Shipways: Two and one-half shipways.

Equipment: 1—45-ton Whirley Crane; 1—7½ ton Bridge Crane; 1—15-ton Bridge Crane; 1—10-ton Bridge Crane; 1—350-ton Joggling Press; 2—Acetylene Generator; 1—Auxiliary Fire Pump; 1—Worthington Air Compressor; 114—Bending and Welding Slabs with stools; 6—Jib Cranes; 1—Trumbull Switchboard; 13—Transformers, 3—200 KVA, 5—100 KVA, 3—50 KVA, 2—75 KVA.

(Testimony of Worth C. Goss.)

Ingress to and egress from this facility will require the purchaser or lessee to secure an easement from adjoining property owners or to construct a ramp from the highway which adjoins this property.

Subject to the terms and conditions and in accordance with the instructions hereinafter contained.

* * *

Received in evidence November 17, 1952.

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Q. Mr. Goss, now with reference to Trustee's Exhibit 7, I will ask you to examine it. Did you submit a bid for the real estate? [35]

* * *

Q. (By Mr. Treadwell): Did you submit a bid for the real estate, Mr. Gross?

A. Yes. The Puget Sound Products Company submitted a bid.

Q. And what did that bid cover with reference to the invitation to bid?

* * *

A. We submitted a bid which I believe was—I am not sure exactly what day is was opened, but in any event we did submit a bid covering this property.

Mr. Diamond: Now I object to the answer to that question. He was asked whether he submitted a bid and he answers by saying "we submitted a bid."

Q. (By Mr. Treadwell): Did the Puget Sound Products Company? [36]

(Testimony of Worth C. Goss.)

A. I am speaking as an officer of a corporation, using the term "we" to describe the Board of Directors and the officers of the company.

* * *

Q. (By Mr. Treadwell): Pursuant to that invitation did the Puget Sound Products Company also submit a bid for the personal property listed therein? A. We did.

Q. Were those bids accepted by the government?

A. Yes, we were the successful—made the successful offer. [37]

* * *

Q. (By Mr. Treadwell): Upon the acceptance of your bids, or the bids of the Puget Sound Products Company, you received a deed from the United States government?

A. I did not personally receive it.

Q. I am talking about the Puget Sound Products Company. Did they receive a deed? [38]

A. To the best of my knowledge, yes.

Q. How much did the Puget Sound Products Company pay for the real estate?

A. I believe a down payment of $20,000, approximately, together with a morgage of something like $38,000 or thereabouts.

Q. How much was bid by the Puget Sound Products Company for the real estate?

A. As I recall the bid, it was about—approximately $58,000, with a $20,000 check as down payment.

(Testimony of Worth C. Goss.)

Q. How much was bid by the Puget Sound Products Company for the chattel, the personal property, with reference to the invitation to bid?

A. I believe approximately $32,000, roughly $32,000. And so much time has elapsed I am not absolutely certain whether the $20,000 covered down payments on both offers, or on one only. [39]

* * *

Q. (By Mr. Treadwell): Do you recall how much the Puget Sound Products Company paid for the personal property?

* * *

A. That was approximately $32,000 plus interest, which was paid in full.

Q. (By Mr. Treadwell): Is that the amount paid at the time of purchase?

A. No, there was a—the government required a certain portion of it to be paid at the time of purchase. I don't recall the exact amount. But the total was thirty-two thousand and some dollars, plus interest, which was paid in full and a bill of sale obtained from the federal government.

Q. Now upon the acceptance of your bids for the real and personal property, did the United States government issue to the Puget Sound Products Company a quit claim deed, being Mortensen's Exhibit 3? Is that correct? A. I believe so.

Q. Now at the time of the issuance of that deed did the Puget Sound Products Company simultaneously execute any documents [41] back to the United States government?

(Testimony of Worth C. Goss.)

A. I believe two documents were executed, one of which was a mortgage on real property as described, and the other was a mortgage on personal property. And the terms of payment were different. One was to be paid over ten years, and one over five years.

Q. That is enough. Now at the same time that those mortgages were delivered did the Puget Sound Products Company deliver any notes to the United States government?

A. I am not familiar with the exact form of the legal papers drawn up.

Q. Handing you what has been marked for identification as Trustee's Exhibit No. 8, I will ask you to examine it and state what that is.

A. That is a promissory note in favor of the War Assets Administration, signed by the Puget Sound Products Company, under date of December 16th, 1947, in the amount of $32,678.40.

Q. What was that note executed for?

A. That was to cover the purchase price on personal property purchased from the War Assets Administration, and is listed in the offer for bids.

Q. The signatures that appear on that are whose?

A. O. P. M. Goss and W. L. Grill. O. P. M. Goss is president of the company, and W. L. Grill, secretary. [42]

Mr. Treadwell: I will offer Trustee's Exhibit 8.

The Referee: Any objections?

Mr. Diamond: No objection.

(Testimony of Worth C. Goss.)

The Referee: It will be admitted.

(Promissory note was received in evidence as Trustee's Exhibit No. 8.)

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TRUSTEE'S EXHIBIT NO. 8

was (s) 4180524

Promissory Note

$32,678.40

Seattle, Washington
December 16th, 1947

For value received the undersigned promises to pay to the order of War Assets Administration, acting for and on behalf of Reconstruction Finance Corporation, (herein called "Payee") at the office of War Assets Administration, located in the City of Seattle, County of King, State of Washington, or at Payee's option at any other place or location designated by Payee, in lawful money of the United States, the principal sum of Thirty-two Thousand Six Hundred Seventy-eight and 40/100 Dollars ($32,678.40), with interest from date at the rate of four per centum (4%) per annum, payable in five (5) equal yearly installments as follows: Six Thousand Five Hundred Thirty-five and 68/100 Dollars ($6,535.68) on December 16, 1948, and continuing yearly thereafter until all five (5) installments have been paid, together with interest payable with each

(Testimony of Worth C. Goss.)

installment on the balance of principal remaining from time to time unpaid.

Payment of any balance or of any future installment of this note may be made at any time with interest to date of each payment; provided that any installment payment or payments so made in advance shall be applied to the last installment or installments becoming due on this note and shall not reduce the amount or defer the due date of any other installment or installments.

This note is secured by a chattel mortgage executed simultaneously herewith on certain described personal property, machinery and equipment of the maker, which said mortgage contains a full description of the mortgaged property, together with the terms of such mortgage.

The indebtedness evidenced hereby at the election of the Payee shall become immediately due and payable without notice should a receiver or liquidator, whether voluntary or involuntary, be appointed for the undersigned, or for the property described in said mortgage, or any substantial portion of maker's property, or should maker execute an assignment for the benefit of its creditors or upon the reorganization, merger or consolidation of the maker (or the making of any agreement therefor.) The Payee is further authorized to declare all or any part of the indebtedness immediately due and payable upon the happening of any of the following events: (1) default in the payment of any part of the principal of the indebtedness when due, or default in the pay-

(Testimony of Worth C. Goss.)

ment of interest on any part of the indebtedness; (2) non-performance by the undersigned of agreements with or required by the Payee in respect of any indebtedness of the undersigned to the Payee; (3) the undersigned's failure duly to account, to Payee's satisfaction, at such time or times as the Payee may require, for any of the collateral or proceeds thereof delivered or caused to be delivered to the undersigned by the Payee, or otherwise coming into the control of the undersigned; or (4) failure of the undersigned to perform or observe any of the obligations, covenants and conditions expressed in any mortgage or mortgages given as collateral to the Payee to cover the indebtedness. The Payee's failure to exercise its rights under this paragraph shall not constitute a waiver thereof.

The rights of Payee, and its assigns hereunder, shall not be impaired by Payee's transfer or assignment of this note or of the mortgage, or mortgages, or by any indulgence, including but not limited to (a) any renewal, extension, or modification which the Payee may grant with respect to the indebtedness or any part thereof, or (b) any surrender, compromise, release, renewal, extension, exchange or substitution which Payee may grant in respect of the mortgaged security collateral, or (c) any indulgence granted in respect of any endorser, guarantor or surety. The assignee or transferee, if any, of this Note or the mortgage, or mortgages, shall forthwith become vested with and entitled to exercise all the powers and rights given to Payee by this Note

(Testimony of Worth C. Goss.)

and by the mortgage, or mortages, as if said assignee or transferee were originally named as Payee in this note, or as the mortgagee in the mortgage or mortgages. All endorsers and guarantors hereby waive presentment, protest and notice of dishonor, and agree to remain bound by all of the terms of this Note.

This Note evidences the unpaid portion of the purchase price of certain personal property, machinery and equipment constituting a portion of Plancor 34 and Plancor 369, known as Lake Washington Shipyards (Government fee-owned portion) and is secured by a purchase money chattel mortgage of even date.

In case suit is brought on this Note, Payee agrees to pay reasonable attorney's fees.

PUGET SOUND PRODUCTS COMPANY,

By /s/ O. P. M. GOSS,
President.

Attest:

[Seal] /s/ W. L. GRILL,
Secretary.

[Stamped]: General Services Administration War Assets Functions—Paid July 1st, 1949.

Approved as to Form:

/s/ HAROLD W. ANDERSON,
Chief, Legal Division, Office of Regional Counsel, War Assets Administration.

Received in evidence November 17th, 1952.

(Testimony of Worth C. Goss.)

(Purchase money chattel mortgage was marked Trustee's Exhibit 9 for identification.)

Q. (By Mr. Treadwell): Handing you what has been marked for identification as Trustee's Exhibit 9, I will ask you to state what that is.

A. This is a purchase money chattel mortgage dated the 16th day of December, 1947, between the Puget Sound Products Company and the Reconstruction Finance Corporation, acting through the War Assets Administration, covering the personal property as listed in the bid offer, and this property is listed independently here. And the purchase money chattel mortgage is signed by O. P. M. Goss, president of the Puget Sound Products Company, and W. L. Grill, secretary.

This is a final list of equipment as purchased and delivered by the government to the Puget Sound Products Company.

Mr. Diamond: No objection to Exhibit No. 9.

The Referee: It will be admitted. [43]

(Purchase money chattel mortgage was received in evidence as Trustee's Exhibit No. 9)

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TRUSTEE'S EXHIBIT NO. 9

Purchase Money Chattel Mortgage

This Indenture made as of the 16th day of December, 1947, between Puget Sound Products Com-

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 9—(Continued)

pany, a corporation existing under and by virtue of the laws of the State of Washington, with its principal place of business in the City of Houghton, Washington, herein called Mortgagor, and Reconstruction Finance Corporation, a corporation duly organized and existing under and by virtue of the laws of the United States, which corporation has succeeded, pursuant to the provisions of Public Law 109, 79th Congress, approved June 30, 1945, to all of the rights and assets of Defense Plant Corporation, acting by and through War Assets Administration, under and pursuant to Reorganization Plan One of 1947 (12 Fed. Reg. 4534), and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765) and War Assets Administration Regulation No. 1, as amended, herein called the Mortgagee.

Witnesseth:

That Mortgagor has purchased from the Mortgagee all right, title, and interest of Mortgagee in and to the personal property, machinery and equipment hereinafter described and to secure the unpaid balance of the purchase price in the amount hereinafter stated, does hereby mortgage to the Mortgagee the following described personal property, machinery and equipment now located and kept at the plant of the Mortgagor at Houghton, King County, State of Washington, to wit:

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 9—(Continued)

1—45-ton Whirley Crane
1—15-ton Bridge Crane
1—10-ton Bridge Crane
1—7½-ton Bridge Crane
1—350-ton Joggling Press
2—Acetylene Generators
1—Auxiliary Fire Pump
1—Worthington Air Compressor
114—Bending and Welding Slabs with stools
6—Jib Cranes
1—Trumbull Switchboard
13—Transformers:
3—200 KVA—DPC Nos. 403-7, 403-8, 403-9
6—100 KVA—DPC Nos. 403-13, 403-14, 403-15, 403-22, 403-28, 403-31
1—75 KVA—DPC No. 403-21
3—50 KVA—DPC Nos. 403-18, 403-19, 403-20.

To have and to hold the said property, machinery and equipment unto the Mortgagee and its assigns forever.

This indenture, however, is intended as a Chattel Mortgage and is given to secure the payment by the Mortgagor to the Mortgagee of the sum of Thirty-two Thousand Six Hundred Seventy-eight and 40/100 Dollars ($32,678.40) in lawful money of the United States, representing the unpaid purchase price of the above-described property, machinery

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 9—(Continued)

and equipment with interest thereon from December 16th, 1947, until paid at the rate of four per centum (4%) per annum, such principal and interest payments to be made in equal yearly principal payments, plus interest at the foregoing rate, according to the terms of a certain Promissory Note dated December 16th, 1947, in the principal sum above stated. This indenture is also intended to secure any and all extensions and/or renewals of said Note and/or indebtedness evidenced thereby and all advances made by the Mortgagee, including but not limited to advances so made for the payment of insurance premiums, taxes, special assessments and levies, liens against the mortgaged property, machinery and equipment and any and all advances made by Mortgagee for the care, preservation, protection and maintenance of the mortgaged property, machinery and equipment.

This indenture is conditioned upon the faithful and punctual observance by the Mortgagor of each and every convenant and agreement contained in said Note and the Mortgagor hereby covenants and agrees with the Mortgagee as follows:

* * *

In Witness Whereof, the Mortgagor has caused this instrument to be executed by its proper officers

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 9—(Continued)

and its corporate seal to be hereunto affixed this 14th day of May, 1948.

[Seal] PUGET SOUND PRODUCTS COMPANY,

By /s/ O. P. M. Goss,
President.

Attest:

/s/ W. L. GRILL,
Secretary.

[Acknowledgment and affidavit of good faith attached.]

Received in evidence November 17th, 1952.

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Q. (By Mr. Treadwell): Now, Mr. Goss, calling your attention to Mortensen's Exhibit No. 4, to a document therein designated as promissory note, I will ask you to state what that is.

A. This is a promissory note dated December 16th, 1947, in the sum of $48,361.60, being the principal sum due on real estate contract on the real property only, under discussion. And this promissory note is signed by O. P. M. Goss, president, and W. L. Grill as secretary, Puget Sound Products Co.

Q. With reference to Trustee's Exhibit No. 8, the promissory note, I will ask you to state whether or not that was ever paid by Puget Sound Products Company. A. I am not sure which No. 8 is.

Q. That is the promissory note covering the personal note.

(Testimony of Worth C. Goss.)

A. The promissory note for $32,678.40 covering the personal note listed, including the cranes, was paid in full.

Q. On what date?

A. I am not sure of the exact date, but somewhere—well, it was some considerable time after the date of the note.

Q. Calling your attention to the third page here.

A. Yes. This note is marked "Paid, War Assets, Special [44] Services Administration, War Assets Funds, paid July 1, 1949", and signed by the War Assets cashier.

Q. Was that note paid off subsequent to the time the United States government commenced the foreclosure on the real property mortgage, or do you recall?

A. I am not sure of the date when the government started the foreclosure.

Q. At that time was the government—at the time you paid that note covering the personal property was the United States government threatening foreclosure, or pressing you for payments?

A. Well, they were pressing the company for payment. That is the reason this note was paid.

Mr. Treadwell: Now, have I offered all of these?

Mr. Diamond: 8 and 9, I think.

Q. (By Mr. Treadwell): Now, Mr. Goss, did you as an officer of the Puget Sound Products Company examine this building prior to the time you submitted the bid to the United States government?

A. I did.

(Testimony of Worth C. Goss.)

Q. What had that building been used for prior to the time Puget Sound purchased it?

A. The purchase was to keep the rain off the steel work being done, keep the rain off the workers. It was an unheated building, ventilated with enormous air vents so the [45] smoke and dust clouds wouldn't bother the workers.

Q. What was the building used for?

A. For working metal sheets.

Q. Plating shop?

A. Yes, for sheets that go on the sides of ships.

Q. And for what purpose did the Puget Sound Products purchase the property?

A. Purchased it to manufacture boards in it, the product called sheet lumber.

Q. What type of business is that? Will you just briefly explain it?

A. The sheet lumber business is a new type of product that is used in homes and building construction for installations such as kitchen sink ledges, table tops, cabinet work, and so forth; used in general in house construction or building construction.

Q. Is the manufacturing of sheet board or sheet wood an experimental product?

A. This is the first time it has ever been attempted anyplace in the world.

Q. At the time you purchased that property did you have any definite engineering plans as to the type of equipment or amount of equipment necessary to manufacture sheetwood?

A. Yes, we had a definite plan, had an engineer-

(Testimony of Worth C. Goss.)

ing plan, which our engineers had estimated should function at least [46] experimentally, and the equipment was installed in accordance with plans so that it could be shifted and moved to improve the efficiency of the plant originally agreed on.

Q. During the operation of the plant or your experiments out there were you attempting to develop a production line? Is that it, for the manufacture of this sheetwood?

A. The object of this operation was to develop a production plant which would actually manufacture this board.

Q. Did you at any time ever develop an economic production line for the production of sheetwood?

A. We were unable to complete the production line to the point where, as it stood, it would show a profit.

Q. Well, during your period of operation, the period the Puget Sound Products used that building, the equipment, the machinery, was being constantly moved and changed?

A. Yes. All the equipment was installed so that it could be easily rearranged for a more efficient attempt at production.

Q. Was there at any time any permanent installations made of any of your machinery or equipment?

A. No, nothing was regarded as complete and final in the stage which the business had arrived [47] at.

* * *

(Testimony of Worth C. Goss.)

Q. (By Mr. Treadwell): Mr. Goss, calling your attention to Claim No. 16 of the Seattle Association of Credit Men, filed in this proceeding, I will ask you to examine the note attached to the claim, dated July 17th, 1949, and state what that is.

A. This is a promissory note secured by a trust mortgage [48] dated July 7th, 1949, promising that the Company will pay to the Seattle Association of Credit Men as trustee, the sum of $80,000 with interest from date.

Q. And to secure that note what was transferred? A. This note.

Q. Or security given?

A. The note was secured by a trust mortgage on all the property of the payor executed and delivered as of the date of July 7th.

Q. Do you recall how many trust mortgages were executed by the Puget Sound Products Company?

A. There was only one trust mortgage, and this is it.

Q. This is the trust mortgage covering the personal property?

A. It covers all the personal property as [49] listed.

* * *

Mr. Treadwell: Trustee's 10 will encompass a note in the amount of $80,000 executed by Puget Sound Products Company to Seattle Association of Credit Men. Securing the note and real estate mort-

(Testimony of Worth C. Goss.)

gage in trust dated July 7th, 1949, covering certain real estate; also securing that note by second document, a chattel mortgage and trust dated the 7th of July, 1949, executed by the Puget Sound Products Company.

(Note and mortgages were marked Trustee's Exhibit 10 for identification.)

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## TRUSTEE'S EXHIBIT NO. 10

3917160

## CHATTEL MORTGAGE IN TRUST

This Indenture, made this 7th day of July, A. D., 1949, by Puget Sound Products Company, a corporation, doing business in the city of Houghton, County of King, State of Washington, Mortgagor to the Seattle Association of Credit Men, a Washington corporation, of Seattle, King County, Washington, Mortgagee,

Witnesseth:

Whereas, said mortgagor desires to obtain an extension of time in which to pay the claims and demands of its creditors, a list of which creditors is herewith furnished to said mortgagee, showing the amounts respectively due and owing to said creditors by said mortgagor; and,

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 10—(Continued)

Whereas, said mortgagee is willing to take a mortgage from said mortgagor on all its property of every kind and description as security for the payment by said mortgagor to said mortgagee of the sum of Eighty Thousand and no/100 ($80,000.00) Dollars in the manner hereinafter provided for, to apply on each and every bona fide creditor's claim filed with said mortgagee, equally and ratably, and without preference, and whether or not said creditor may have been mentioned in said list furnished to said mortgagee:

Now therefore, the said mortgagor, in consideration of the premises, and of the covenants hereinafter contained, and of the sum of One ($1.00) Dollar, to it in hand paid by said mortgagee, and other valuable considerations, the receipt whereof is hereby acknowledged, has, for the purpose of securing the payment of said claims and debts, represented as aggregating the said sum of Eighty Thousand and no/100 ($80,000.00) Dollars, granted, bargained, sold and mortgaged, and by these presents does grant bargain, sell and mortgage unto the said mortgagee, its successors and assigns, the following described personal property, to-wit;

All that certain stock of goods, wares and merchandise, together with all good will incident to the business, all routes, customer lists, patents and patent rights and trade marks and all personal prop-

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 10—(Continued)

erty of every kind and description used in, about and as a part of the business of said mortgagor, consisting principally of Sheetwood, Pressed Board, raw materials, chemicals and supplies, and whether or not the same is contained or used in or about the premises above described, including among other things those certain fixtures, furniture, tools, appliances, machinery and equipment and automobiles more specifically described in an itemized list attached hereto marked Exhibit "A" and made a part hereof, which list shall not be considered as excluding any other item of property covered by the general description in this paragraph;

and all books of accounts, and accounts and notes, contracted and to be contracted from the sale of the above goods, wares and merchandise and additions thereto, the same having been assigned by a separate instrument in writing; and all cash now on hand, deposited in bank, or hereafter acquired;

together with all goods, wares and merchandise, furniture and fixtures, tools and appliances, machinery and equipment, and automobiles, which may be added to and incorporated or mixed with the same by said mortgagor, and whether or not such items are renewals, repairs, replacements, or a complete substitution therefor;

and said mortgagor does hereby certify that it is the true and lawful owner of said property, that the same is now in its possession, and is principally lo-

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 10—(Continued)

cated at and in or about that certain building or storeroom located in the City of Houghton, County of King, and State of Washington; that it has the right to mortgage, sell and transfer the same, and that the said property is free and clear from all encumbrances except the following:

Valid subsisting liens and encumbrances of record;

To Have and To Hold, all and singular, the personal property aforesaid forever, but in trust, nevertheless, for the use and benefit of the present unsecured creditors of said mortgagor, subject to the terms, conditions, provisions and stipulations hereinafter set forth; provided, always, and these presents are upon the express condition, that if the said mortgagor shall pay or cause to be paid unto the said mortgagee, its successors or assigns, the sum of Eighty Thousand and no/100 ($80,000.00) Dollars, with interest at the rate of 6 per cent per annum from date hereof until paid, according to the conditions of one certain promissory note of even date herewith made payable at a date certain to said mortgagee, with interest at the rate of 5 per cent per annum from to be void and of no effect.

* * *

In Witness Whereof, the said mortgagor has caused this instrument to be executed and its cor-

(Testimony of Worth C. Goss.)

Trustee's Exhibit No. 10—(Continued)

porate seal attached by its officers thereunto duly authorized, the day and year first above written.

[Seal] PUGET SOUND PRODUCTS COMPANY,

By /s/ O. P. M. GOSS,
President.

Attest:

/s/ W. L. GRILL,
Secretary.

State of Washington,
County of King—ss.

O. P. M. Goss and W. L. Grill, the President and Secretary respectively of the mortgagor corporation in the foregoing mortage named, being first duly sworn, on oath depose and say: That the aforesaid morgage is made in good faith and without any design to hinder, delay or defraud creditors, and that they are authorized to make this affidavit for and on behalf of said corporation.

/s/ O. P. M. GOSS.

/s/ W. L. GRILL.

Subscribed and sworn to before me this 7th day of July, A. D., 1949.

[Seal] /s/ E. V. GRISVARD,
Notary Public in and for the State of Washington, residing at Seattle.

(Testimony of Worth C. GOSS.)
Trustee's Exhibit No. 10—(Continued)

State of Washington,
County of King—ss.

This Is To Certify, that on this 7th day of July, A. D., 1949, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came O. P. M. Goss and W. L. Grill to me known to be respectively the President and Secretary of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal, the day and year in this certificate first above written.

[Seal] /s/ E. V. GRISVARD,
Notary Public in and for the State of Washington, residing at Seattle.

Filed for Record July 8th, 1949, 8:56 A.M.

[Description of property same as that attached to Findings of Fact and Conclusions of Law Upon Hearing of Show Cause Order Directed to Nelse Mortensen & Co., Inc., filed in Referee's Office January 12, 1953.]

(Testimony of Worth C. GOSS.)
Trustee's Exhibit No. 10—(Continued)

State of Washington,
County of King—ss.

I, Robert A. Morris, Auditor of King County, State of Washington, and ex-officio Recorder of Deeds, and the legal keeper of the records hereinafter mentioned, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a Chattel Mortgage in Trust, Aud. Rec. No. 3917160, Vault File No. 2447994 as recorded in this office in Vol. 71 of Chat. Mtgs., Page 657 Records of King County.

Witness my hand and official seal this 20th day of November, 1952.

ROBERT A. MORRIS,
Auditor of King County,
Washington,

By /s/ HUNTER SEWELL,
Deputy.

No. 9955

Received for identification November 17th, 1952.

(Testimony of Worth C. GOSS.)

Q. (By Mr. Treadwell): Now Mr. Goss, with reference to the two cranes, will you briefly describe those cranes as they existed at the time the Puget Sound Products Company acquired the property?

A. The cranes were acquired—there was three cranes acquired, one of which was sold, and the two cranes remaining operate in the building, or at the time the company purchased them, as personal property, the two on the east—along the east track, the east side of the building, ran in [51] and out of the building on separate electric trucks so that it could either go in the building or could go out on the Lake Washington Shipyard Company's property.

Q. How long a track were the cranes on at that time?

A. Well, the track, oh, something like three to four hundred feet away from the building under discussion. The crane on the west side of the building was of the same general construction designed to roll on its own electric truck, but the track in that case ran the length of the building only.

Q. There was a big crane outside that was sold, is that correct?

A. There was an additional whirley crane on the dock, which was also sold, making the total number of cranes purchased by the Puget Sound Products Company was four. One small rig crane inside the plant which ran either inside or out to the property next door—out on the property next

(Testimony of Worth C. GOSS.)

door was sold; and one large whirley crane out on the track was sold.

Q. Now with reference only to your 10-ton bridge crane and the 15-ton bridge crane, they are now on the property?

A. Yes. The 10-ton bridge crane was designed and tracks and crane supports were installed in the building. The crane supports in the building are separate from the building, they are simply fastened on, slapped on the building. [52] And then the supports ran outdoors, across a roadway, and down three to four hundred feet on the Lake Washington Shipyard Company's property.

Q. That was the 10-ton?

A. The 10-ton crane, yes.

Q. What was the original layout of the 15-ton crane?

A. Well, the 15-ton crane is built on a runway, or the crane supports, heavy timbers separate from the building, simply slabbed onto the building timbers, which are removed without injuring the building, with rails on top. And the runway which the large 15-ton crane runs on, goes inside the building on the west side, and the length of the craneway is the length of the building.

Q. How are the craneways constructed?

A. Well, the craneways are made from very large and heavy timbers that are slabbed up against the main supports for the building.

Q. By the main supports, now——

(Testimony of Worth C. GOSS.)

A. (Interrupting): That is the main posts of the building.

Q. And by slabbed up, what do you mean?

A. It means fastened there by removable fastenings.

Q. Are they flush against it, or apart?

A. They are not flush. There is a space of several inches, I believe, between the main building supports and the [53] craneways, the craneway structure.

Q. Are the craneways in any way part of the structure support of the building? A. No.

Mr. Howe: Object to that as calling for a conclusion of the witness.

A. (Continuing): Not at all.

The Referee: Oh, I think the answer may stand.

Q. (By Mr. Treadwell): Now with reference to the transformers: They are located, I think you testified, in the transformer shed or house? What do you call the building in which the transformers are located?

A. We call it the transformer vault.

Q. How many are in that vault now?

A. There is one lighting transformer there of a hundred—either 75 or 100 kilowatts—and three power transformers of 100 kilowatts each.

Q. They are now in the vault?

A. They are now in the vault.

Q. How are they secured in the vault?

A. Well, we moved them into place with a very heavy hand truck and just set them on the floor.

(Testimony of Worth C. GOSS.)

Q. Are they bolted to the floor?

A. They are not fastened down.

Q. Bolted to any wall? [54]

A. No.

Q. They set free on the floor? A. Right.

Q. Where are the 50-watt transformers located? Three of those?

A. Those are not installed on the property at all.

Q. Where are they?

A. I don't know. They were sold long ago.

Q. Who sold them?

A. Puget Sound Products Company.

Q. The 50-kilowatt transformer?

A. I believe so.

Q. You say they are not now on the property?

A. No. The present transformers on the property are one lighting transformer, three hundreds of 440 volts, three two-hundreds of 440 volts, and three one-hundreds of 220 volts.

Q. You are sure there are no kw. transformers there now?

A. I am quite—to the best of my knowledge there are not. Actually, those 50-kilowatt transformers were not usable. They were found to be faulty.

Q. Where are the three 200 kw. transformers?

A. They are right beside the Puget Sound Power & Light Company substation. They are right on the ground.

(Testimony of Worth C. GOSS.)

Q. Right in back of your transformer [55] vault?

A. Yes, they are on the ground there, setting on timbers.

Q. And how is the timber fixed to the ground?

A. Well, it just lies on the ground.

Q. And you have one Maloney transformer, 75 kw. is that?

A. I believe that is the lighting transformer.

Q. How many transformers do you have altogether?

A. There is one lighting transformer, and three power transformers inside the vault. There is three 200-kilowatt transformers outside of the vault, and three 100-kilowatt transformers outside of the vault.

Q. You have three in and six out?

A. Three in and six out, and one lighting transformer in the vault.

Q. That is right. But none of them are attached or affixed to the property?

A. No, they are installed in the same manner that the power company installs transformers on anybody's property.

Q. The purpose of those transformers, the one operates the lighting system and the others all operate the power equipment, is that correct?

A. That is correct, including the cranes.

Q. Have Puget Sound Products been using that equipment since the foreclosure of the mortgage by the United States Government? [56]

A. Yes, it has been in more or less continuous

(Testimony of Worth C. GOSS.)

use. Not in a plant way, but in an experimental way, for various tests and so on.

Q. Has the equipment been used by Mortensen since he took possession of a part of the company?

A. Yes, Mortensen's company has used it a large

* * *

percentage of the time. [57]

Q. (By Mr. Treadwell): Has Puget Sound Products been using this equipment? A. Yes.

The Referee: When you say "this equipment", what do you mean?

Mr. Treadwell: The transformers.

The Referree: All of them?

Q. (By Mr. Treadwell): All of the transformers?

A. That is a little complicated. However, in general there has been use of all of them, yes.

The Referree: They are hooked up?

A. They are all hooked up.

Q. (By Mr. Treadwell): Have they been used?

A. They have been used for various tests in an effort to further the possibilities of the company reorganization, and prior to that time they were used constantly in tests on boards.

Q. Subsequent to the time Mortensen & Son acquired the real estate and buildings, was there any agreement made with them by the Puget Sound Products Company relative to the use of those transformers? [58]

* * *

(Testimony of Worth C. GOSS.)

A. Yes.

Q. (By Mr. Treadwell): What was that agreement?

A. The agreement was a verbal one between Mr. Slater as agent of the Mortensen Company and myself as vice-president of Puget Sound Products Company, to the effect that I had requested that if we aided Mortensen in acquiring this property, that we would like a 12-months' free lease on the property in return for which we would permit Mortensen free use of our cranes or whatever equipment they could use. And I have been very careful at all times to offer them all of our facilities and cooperate in every possible way.

Mr. Slater put it up, he said, to the principals of his company and returned with the offer that they were not willing to give a 12-months' free lease, but that they would give us a 6-months' lease, and in the meantime something more permanent could be arranged. And on his assurance, together with his assurance that the Mortensens were supremely fine people to deal with, we proceeded.

(Short recess.)

Q. Now, with regard to the Trumbull switchboard, will you state where that is located on the premises?

A. The Trumbull switchboard is located in the transformer [59] vault which is labeled differently on different sketches; in Mortensen's exhibit of the property it is labeled——

(Testimony of Worth C. GOSS.)

Q. Just state where it is.

A. It is in a concrete vault at the east side of the building.

Q. What is the purpose of that switchboard?

A. It is to measure the power. It has several functions. The Puget Sound Power & Light Company has equipment on it that meters the power, which we gave them permission to put on it. And it serves the purpose of turning the power on and off to various portions of the plant. And it also serves as a safety function of permitting emergency cut-offs and so on of the power in the plant.

Q. Well, when we are talking of power we are talking of the power that runs the equipment; is that it?

A. That is for the equipment only, yes.

Q. Has it anything to do with the lighting?

A. I don't believe so.

Q. What did the heating system—of what was the heating system composed that Puget Sound Products Company installed on the premises?

A. Well, as I stated, the building itself was never designed to be heated, because it has got enormous open vents at the top of the building. And there was so much draft through the building that we put a spot heater in to keep [60] the men warm by one of the lathes.

Q. What type of heater?

A. It is an oil-fired heater. It is portable and can be hooked to an oil supply pipe at any place, and to the power system and it is self-operative.

(Testimony of Worth C. GOSS.)

Q. As I understand, that is a portable piece of equipment, moved from place to place to keep men warm wherever the men happened to be working; is that it? A. That is right.

Q. And that is still on the premises?

A. Yes.

Q. With reference to the auxiliary fire pump, where is that located?

A. That is located down right above the water one one of the docks, right above Lake Washington.

Q. And what purpose does that serve?

A. Well, that is supposed to be used in case of emergency fire, if there should be a failure in the city water system, although we installed a double water supply system and presumably it is not actually needed for the fire protection system.

Q. And how is that attached to the dock?

A. That just sets on the dock. I am not sure, there may possibly be a couple of lag screws or something, just fastens it down loosely to the wooden dock. [61]

Q. How many hours' power does that pump generate?

A. I believe that that is 40 hours power pump.

Q. That is the motor that is attached to the pump? A. Yes. [62]

* * *

Q. How were the three diatherm boilers fixed to the property?

(Testimony of Worth C. GOSS.)

A. They are not fixed to the property at all. They simply set on the floor. [63]

* * *

Mr. Grill: I wonder if I might ask a few questions here.

The Referee. Unless objection is made.

Cross-Examination

By Mr. Grill:

Q. Mr. Goss, did Puget Sound Products Company put any conduits through the building, electric conduits, to this equipment later?

A. Yes. Each machine was wired up by the Watson Electric Company.

Q. And did these conduits run from the transformer vault or thereabouts? A. Yes.

Q. And did that occur in practically every piece of machinery, every piece?

A. Yes, each machine was wired up specially with its own safety conduits.

Q. How were these conduits attached to the building? [64]

A. Usually by siniple screw brackets.

Q. May they be taken down without any injury to the premises? A. I believe so.

Q. Well, what would have to be done to take them down?

A. Well, the screw brackets would be unscrewed and the conduits just lifted out of place. [65]

* * *

(Testimony of Worth C. GOSS.)

Mr. Franco: I wanted to ask one question, if the Court please.

Cross-Examination

By Mr. Franco:

Q. Mr. Goss, referring to Exhibit 2, I believe, which was a real estate purchase money mortgage, and also the chattel purchase money mortgage, and the two promissory notes that were exceuted to the United States, do you recall those? A. Yes.

Q. On December 1, 1947? A. Yes.

Q. Now, other than those documents, in other words than the two notes for approximately thirty-eight thousand and thirty-two thousand respectively, and the two mortgages, real estate and chattel mortgages, were any documents issued or executed to the United States by Puget Sound Products?

A. To the best of my knowledge, that covered the transaction. [66]

Q. That covered the entire transaction. And after the payment in full of the promissory note which was secured by the chattel mortgage, which I believe you stated was on or about July 1, 1949—— A. (Interrupting): Yes.

Q. (Continuing): ——was there a modification, amendment, change or new document of any kind executed by Puget Sound Products to the United States?

A. Does that question refer to the chattel mortgage?

(Testimony of Worth C. GOSS.)

Q. It refers to either the chattel or the real mortgage, the real estate mortgage?

A. Well——

Q. Was there any change made at all?

A. In the chattel mortgage, that was the final act. The payment of that note and the government's books in that case were closed.

Q. And was there any change made at all between the date of the execution, of the original execution of the purchase money real estate mortgage on December 16, 1947, and the time that that mortgage was foreclosed by the government?

A. I believe that some arrangement was made to pay rent on either all or portions of the premises. I didn't handle that myself.

Q. What I mean is, was any change made in the face of the document itself? [67]

A. To the best of my knowledge, no.

Mr. Franco: I think that is all.

Redirect Examination

By Mr. Diamond: [68]

* * *

Q. The only document that you ever received with reference to the transfer of the title to Puget Sound is Exhibit 3, which is entitled "Quit Claim Deed", isn't that correct?

A. I am not sure whether that is the only thing or not.

Q. Well, you can't tell us any other document

(Testimony of Worth C. GOSS.)

which you received that conveyed any title to anything can you?

A. I know of no others, personally.

Q. Now Mr. Goss, there are some foundations for the crane, are there not, that support it?

A. The crane runway I believe sets on the—just simply sets on the main blocks used for the building supports.

Q. Do you know anything about construction?

A. I am not too well qualified.

Q. You don't know whether or not there would have to be any foundations to support the crane or not?

A. Obviously it has got to either set on a strong floor or something.

Q. Do you know that the foundations that support the crane are the same foundations that support the building, and were built at one time?

A. I don't know when they were built.

Q. Now you stated that these items that you were referring to as loosely connected by bolts and easily moved about, [69] were continually being used by Puget Sound. Is that correct?

A. I didn't say continually used.

Mr. Treadwell: Your Honor, I am going to object now. Counsel is cross-examining his own witness.

The Referee: He may do so.

Q. (By Mr. Diamond): Well, did Puget Sound use the cranes after Mortensen took over?

Mr. Franco: I don't think this is proper re-

(Testimony of Worth C. GOSS.)

direct, your Honor, if that is what it is supposed to be.

The Referee: Well, we have kind of obliterated which it is. He is a witness here. He may inquire.

Q. (By Mr. Diamond): The question is whether or not you used the cranes after Mortenson took over.

A. Well, I have personally used them, yes, so that as an officer of the company I presume Puget Sound used them.

Q. You have used them for what purpose?

A. For purposes, experimental purposes, the function of the company.

Q. Mr. Goss, you were not actually in possession and making use of the cranes after the Mortensens moved into the plant, were you?

A. Well I have used the cranes.

Q. But will you answer my question?

A. Well, certainly, we are in possession.

Q. Of the cranes? [70]

A. Surely. They are our property.

Q. It is your property?

A. Well, of course they are our property.

A. And who are you?

A. An officer of Puget Sound Products Company.

Q. Does that property belong to the Puget Sound Products Company? A. Surely.

Mr. Franco: That is an improper question. He is asking the witness for a legal conclusion which I think only the Court can answer.

(Testimony of Worth C. GOSS.)

The Referee: I don't believe he can answer it, but let it go.

Q. (By Mr. Diamond): Now the transformers that are out there, they are used for operating the cranes, are they not? A. One set.

Q. Have the Mortensens been using the cranes?

A. Yes.

Q. Do you know what would happen with reference to the use of electricity, if you took out all the transformers on that property?

A. Presumedly have to get the Puget Sound Power & Light Company to put some more in, if you wanted the light.

Q. Now you spoke of some boilers that were set down in the premises. Is that right? [71]

A. I said they are set on the floor.

Q. What kind of a floor?

A. Whatever kind happens to be under each boiler, concrete or asphalt.

Q. Well, let's talk about the boilers that are or were over on the side of the building where you extended the building and made it larger in order to house them. Do you know which ones I am referring to? A. Yes.

Q. And you did extend the building there to house them? A. We did.

Q. You took out a wall or moved a wall out further; is that right? A. Yes.

Q. You poured a concrete floor to house the boilers?

A. You can't house a boiler on a floor.

(Testimony of Worth C. GOSS.)

Q. All right, to set the boilers on.

A. We either put asphalt or concrete or wood under them. I am not sure which.

Q. You put a substantial amount of concrete. didn't you?

A. I wouldn't say substantial. If it is on concrete, it is rather a light floor.

Q. Was that concrete put in especially to hold the boilers?

A. That I couldn't say for sure. The room was simply [72] floored. As I recall it, at the time the house was built there, the second boiler was not even contemplated.

Q. And that concrete over there was merely put for walking purposes?

A. The concrete where the second boiler was, was I believe, put there for walking purposes, and wheeling barrels around.

Q. Your answer makes me ask, what about the first boiler, the concrete for that one?

A. I think that that concrete was probably set there especially for the one diatherm boiler.

Q. That goes down in the ground, a big hole too, doesn't it? A. That is right.

Q. Couldn't very well walk on that, could you?

A. If you get down in the hole.

Q. Now you spoke of some conversations with a Mr. Slater. Right? A. That is correct.

Q. That was prior to the Nels Mortensen & Company purchasing, or acquiring the property out there, was it not? A. That is correct.

Q. You didn't talk to him after, did you?

A. The what?

(Testimony of Worth C. GOSS.)

Q. You didn't talk to him after, did you? [73]

A. He brought a Mr. Nels Mortensen over and a Mr. Henderson.

Q. Did you talk to Mr. Slater after the Mortensens had purchased the property?

A. No, I talked to Mr. Slater prior to the purchase of the property.

Q. You know that he is not connected with Nels Mortensen & Company?

A. All I know is that he appeared.

Q. Will you answer my question?

A. He said he was.

Q. You don't know that he was not connected with them?

A. Well, he brought Mr. Nels Mortensen and Mr. Henderson over. They appeared to accept him.

Q. The answer to my question is that you didn't know?

Mr. Franco: Oh, if the Court please——

The Referee: He has answered the question.

Q. (By Mr. Diamond): Now your conversations with Mr. Slater were with reference to your selling to Mr. Slater or somebody he was representing, the property over there. Is that right?

A. No.

Q. Nels Mortensen & Company didn't buy anything from you or the Puget Sound Products Company, did they? A. No. [74]

* * *

(Testimony of Worth C. GOSS.)

Recross-Examination

By Mr. Treadwell:

Q. When you first met Mr. Slater, whom did he represent himself to be?

A. He told me that he was representing the Nels Mortensen Company.

Q. Thereafter did Mr. Slater bring Nels Mortensen to examine the premises?

A. He did, together with Mr. Henderson.

Q. And what was the purpose of that examination, do you know?

A. The purpose was to check up on the correctness of what Mr. Slater had told them, apparently, and to examine the real property and the personal property. They insisted on a complete examination.

Q. What was the purpose of Mr. Slater's contacting you?

A. Mr. Slater was attempting to either lease or buy property suitable for operating a construction business.

Q. And did he state who he was representing?

A. Did Mr. Slater state that? [76]

Q. Yes.

A. Mr. Slater stated he was representing the Nels Mortensen Construction Company.

Q. Did he make an examination of your property, the property of the Puget Sound Products Company?

A. He did. He carefully examined the real property, and then carefully examined the personal

(Testimony of Worth C. Goss.)

property to make clear just what the Nelse Mortensen Company would purchase.

Q. Were you with him at the time that examination was made? A. I was with him.

Q. Did you and Mr. Slater have any discussion as to what comprised the real estate and what comprised the personal property?

A. Well, he said that in view of the fact that the Puget——

Mr. Diamond (Interrupting): I object to anything that he said.

Q. (By Mr. Treadwell): Did you have a discussion? A. Yes, we had a full discussion.

Q. What did you advise Mr. Slater as to the property available as the real estate?

A. I explained exactly what the real estate consisted of as we had purchased it. [77]

* * *

The Referee: Particularly, what did you say and what did he say? That is what he is asking.

A. I explained to Mr. Slater that the property had been foreclosed, and that the only way the Mortensen Company could purchase it at a very great financial advantage was to work through the Seattle Association of Credit Men, who had the redemption right. We knew that other people were ready to buy the property. And as a result of the fact that I—my explanation, that if they would purchase the property it would be ideal for them because, speaking as the debtor in possession of all the personal

(Testimony of Worth C. Goss.)

property there, I said that they would be free to use that until the property was sold, and that they would have first option to purchase these cranes. And that was satisfactory, both with Mr. Slater and then with Mr. Nelse Mortensen and Mr. Shepherd. [78]

Q. Let's just stick to Mr. Slater. A. Yes.

Q. Did you and Mr. Slater examine the plant by walking through it?

A. We walked through it and around it, very completely. In fact, three times.

Q. What did you say to Mr. Slater as to what property comprised the real property?

A. I told him at that time——

Mr. Diamond: I object to that question now, as to what he said was the real property.

The Referee: You can state as near as you remember, Mr. Goss, what he said or what you said.

A. I said that the real property which we had purchased from the government consisted of the buildings, the fire system, fire protection system, and the toilets, and that all other personal property belonged to the Puget Sound Products Company and had been purchased under separate contract and paid for in full. The reason for that explanation was that I was attempting to get Mr. Slater's principals to purchase the property so that we could stay there without disturbing our equipment. And as a business inducement, I offered the free use of all this personal property.

(Testimony of Worth C. Goss.)

Q. Well now, you say, "all this personal property." What do you mean by that? [79]

A. By the personal property, principally the item Mr. Slater said he wanted particularly was the use of these two large cranes.

Q. Anything else that Mr. Slater was interested in?

A. He brought Mr. Hendrickson, I believe a superintendent with the Nelse Mortensen Company, over, and asked Mr. Hendrickson the same question, in my presence. And the two of them, Mr. Slater and Mr. Hendrickson, agreed that the cranes were the principal item needed and would be extremely helpful to the construction operation they had in mind.

Mr. Diamond: Will you fix the time he was talking to Mr. Hendrickson?

A. These talks occurred, I believe, in——

Mr. Diamond: Before or after the property was acquired by Mortensen?

A. It was before the property was acquired.

Mr. Diamond: Mr. Hendrickson?

A. This particular discussion with Mr. Hendrickson occurred before the property was acquired by Mortensen. He was the second advance investigating agent.

Q. (By Mr. Treadwell): Now with regard to your conversations first with Mr. Slater and second with Mr. Hendrickson and Mr. Slater, were there raised by them either time the probability that some

(Testimony of Worth C. Goss.)

of the machinery and equipment might be part of the real estate? [80]

A. No. But they did insist, they did insist that they have first right to purchase the crane equipment.

Q. Now when did you first meet Nelse Mortensen?

A. Following Mr. Hendrickson's visit. He apparently reported that in his opinion the property was——

Q. (Interrupting): Never mind what he reported.

A. Well, in any event, following Mr. Hendrickson's visit, Mr. Mortensen and Mr. Hendrickson came over to our office at the plant.

Q. Was that prior to the acquisition of the property by Mortensen and Son? A. Yes.

Q. And what was said between the parties at that time?

A. Well, I used the strongest inducement that I had, which in that case was the free use of this personal property, principally the cranes and other items, if they would purchase the property and give us this free lease. I very carefully explained all the advantages of them purchasing the property, because of the fact that we could let them use this property without cost to them, and that if it was desired to sell the personal property later, they would have the first option to buy at a price equal to what anybody else was willing to pay. And Mr.

(Testimony of Worth C. Goss.)

Mortensen, Nelse Mortensen, said that was satisfactory, that was fine.

Q. On that occasion did Mr. Mortensen or Mr. Hendrickson [81] raise any question or make any claim to any of the machinery and equipment as being part of the real estate?

A. No, they rather indicated that they thought that was a fine situation.

Q. At that time you offered them the proposition that you would help them acquire the property if you got a year's free rent; is that it?

A. That is right. Without our help they would have been unable to acquire the property.

Q. You have been on the premises ever since 1947? A. That is correct.

Q. You not only operated Puget Products Company, but you have a laboratory as part of the building? A. That is right.

Q. You have been continuously there since you acquired the property? A. Yes.

Q. That is up to the present date?

A. Yes.

Q. You are still there? A. Yes.

Q. At any time subsequent to the purchase of the property by Nelse Mortensen & Company did Mr. Nelse Mortensen or anyone on their behalf make any claim to you as owning any of the machinery or equipment in the building? [82]

A. No, he did not. On the contrary, on three separate occasions he asked if we would now sell the cranes.

(Testimony of Worth C. Goss.)

Q. When was the last time they asked you whether or not you were in a position to sell the cranes?

A. I don't recall the exact time. I think possibly Mr. Cliff Mortensen was present when his father asked if we would sell the cranes. I reiterated my original offer, that we would certainly sell to them in preference to anybody else.

Q. How long ago was that, the last conversation you had?

A. I dont recall the exact time. Possibly Mr. Cliff Mortensen might remember the time. Some months ago.

Q. Well, you stated, did you, that on three occasions subsequent to Mortensen acquiring the property, they talked to you about the cranes?

A. That is correct.

Q. When was the first occasion?

A. Well, the first occasion was immediately after the purchase by Mortensen.

Q. And what was the substance of that conversation?

A. Well, Mr. Mortensen apparently would have felt more secure if he purchased the cranes along with the buildings, but I said that we would not sell without notifying him and giving him first opportunity to purchase at a price equal to what anybody else would offer. However, we were in possession of offers at that time, which I informed him of. I said we [83] had had an offer of some $8,100 for one of the cranes, but that we had turned it

(Testimony of Worth C. Goss.)

down largely to accommodate the Mortensen Company.

Q. When was the second time?

A. Well, the second time was at—two or three months later in the presence of Mr. Cliff Mortensen when Mr. Nelse Mortensen offered to buy them and I said it looked as if we might possibly have to sell and that we would sell to the Mortensens at the price equal of what anybody else would pay us. And Mr. Cliff Mortensen very vigorously asked me, he said, "I don't think you should sell at all." He said, "Why don't you just leave them here"? And he said, "I think that would be very helpful to both of us. We would even consider helping you making these boards, and without the cranes it would be very troublesome." He said, "I don't think you should sell at all."

Q. When to your best recollection was the third time?

A. Well, the third time was, as I recall, three or four months ago. And I repeated the conversation again. Apparently he has been somewhat worried about the subject.

Q. Did Mortensen & Sons ever submit to you or your father, if you know, a tentative plan of reorganization of Puget Sound Products Company?

A. They did submit an offer. I don't know that it could be called a tentative plan of reorganization, but they [84] did submit an offer to run the plant of the Puget Sound Products Company.

(Testimony of Worth C. Goss.)

Q. At that time, was that in writing?

A. That was in writing.

Q. At that time they made no claim to any of the machinery or equipment?

A. Not at all. In fact, that was the period in which Mr. Cliff Mortensen urged me not to sell.

Mr. Diamond: You have the document. I think it is the best evidence.

(Discussion off the record.)

Mr. Treadwell: I have no further questions.

Redirect Examination

By Mr. Howe:

Mr. Howe: Will you mark this as Mortensen's Exhibit whatever the number is?

The Referee: We will save that 10 for that certified copy.

(Document was marked Mortensen's Exhibit No. 11 for identification.)

Q. (By Mr. Howe): Mr. Goss, handing you what has been marked as Mortensen's Exhibit No. 11, I will ask you to examine that. Is that the proposition of Nelse Mortensen & Company that you just referred to in your testimony, with [85] reference to the operation of the plant for Puget Sound Products?

A. Yes, I believe—they sent a copy to me. I had not seen the original before. But I believe this is the letter I referred to.

(Testimony of Worth C. Goss.)

Q. Now, referring to your testimony with reference to conversations with Mr. Slater, Mr. Hendrickson and the Mortensens, at the time these conversations took place the Puget Sound Products Company was the debtor in possession of this property, was it not? A. That is correct.

Q. That was before a receiver or trustee had been appointed? A. That is correct.

Q. And at that time you were attempting to sell the equity of redemption which the Puget Sound Products Company had to the Mortensens under a deal whereby they might redeem through Puget Sound Products' right of redemption. Is that right?

A. No, that is not correct.

Q. Well, weren't you up with Mr. Nickol and tried to work out with me a deal whereby Puget Sound Products would sell their equity of redemption to us under an agreement whereby Puget Sound Products should have a right to possession for a few months? [86]

A. To the best of my knowledge, the only offer I ever made was from—the idea originated with Mr. Grill, was to sell the right of redemption of the Seattle Association of Credit Men.

Q. Well now, I don't want to interrupt you, but wasn't that something that took place after all attempts to make a deal through the Puget Sound Products Company had failed, and that this was something entirely new so far as the redemption was concerned, through the Seattle Association of Credit Men?

(Testimony of Worth C. Goss.)

A. Well, it wasn't new to me. That is the only idea that I had considered. Mr. Grill told me that was the way to do it.

Mr. Howe: I will offer in evidence Exhibit No. 11 for identification.

Mr. Franco: I wonder if I might see it, Mr. Howe?

Q. (By Mr. Howe): The Puget Sound Products Company never at any time redeemed or delivered or executed or sold to Mortensen & Company any right of redemption or any other property at all, did they? A. No.

Mr. Howe: That is all.

Mr. Franco: No objection.

The Referee: It will be admitted.

(Mortensen's Exhibit No. 11 was received in evidence.) [87]

(Testimony of Worth C. Goss.)

MORTENSEN EXHIBIT No. 11

Nelse Mortensen & Co.
Incorporated
General Contractors
Commercial—Industrial—Residential
1021 Westlake Avenue North
Seattle 9, Washington—Phone GA. 5555

March 12, 1952.

Puget Sound Products Company
Houghton
Washington

Gentlemen:

We have given considerable study to your proposed plant operation for the manufacture of ¾" hard surfaced fiberboard in line with our numerous meetings with your board of directors. In giving this matter study we believe that an efficient and profitable operation could be set up to manufacture this board. We would recommend that a small operation be started for this manufacturing process and we feel that it would require approximately five plant men. Prior to this it would take three to four good mechanics versed in machinery installations to set up existing machinery in the manner in which we would recommend.

We believe that with an approximate outlay of $15,000 to $20,000 you could have this board on the market and showing a profit over and above cost for

(Testimony of Worth C. Goss.)

wholesale and retail sales of same. We are willing to undertake to set up this project and feel well qualified in production methods in this field. We are willing to expend our time and effort in supervision of this operation as will be required for a fee of 25% of the profits which would be made on the sale of the board plus an agreed block of stock to be given to us when successful production is obtained.

We could go into a lot further detail in this regard but believe first we should know if you are able to raise the required money before we would invest our services and time in the production. If there is any further information you need, please feel free to call us.

Yours very truly,

NELSE MORTENSEN & CO., INC.,

By /s/ FRANK V. HENDERSON,
Vice-President;

By /s/ CLIFF MORTENSEN,
Secretary.

CM:tfm

Received in evidence November 17, 1952.

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Mr. Treadwell: I have no further questions.

Mr. Franco: I have no further questions, your Honor, of this witness.

Questions by the Referee:

(Testimony of Worth C. Goss.)

Q. When you first purchased this building from the War Assets Administration, what kind of fire prevention system was installed there then?

A. It had a sprinkler system that was not complete. It had everything to it but water. It had no water for it. The sprinkler heads were all over the building, and the pipes, but they weren't connected up to water.

Q. Are the heads and pipes there now, the same ones? A. The same ones are there now.

Q. And what addition, if any, did the Puget Sound Products Company make?

A. Well, we installed the fire prevention pump listed there, and we also arranged with the city of Kirkland to put in a very fine and very carefully designed heavy-duty water supply from the city of Kirkland. We got the City Council to pass an ordinance permitting us to do that, and we paid for the connection from the city of Kirkland line down to the fire system.

Q. And those are in there now?

A. Those are in there now. [88]

Q. Well, this auxiliary pump sitting on the dock, could that be removed without danger to the other fire protection system?

A. Yes, that is purely an auxiliary. The two main water lines would be in addition to that.

Q. Well, would there by any salvage in removing this overhead pipes and sprinkler system?

A. Oh, a good many thousand dollars, your

(Testimony of Worth C. Goss.)

Honor. It is a very valuable system, in fact. It would run many, many thousands of dollars.

Q. I know it has run many, many thousands of dollars to install. But my question is to take it out and sell it.

A. I think that some thousands of dollars could be obtained.

Q. These transformers, they are to transfer high tension power to low tension power?

A. That is correct.

Q. And there is some six or eight of them there?

A. I believe ten altogether, your Honor.

Q. And they are no part of the building?

A. Not at all.

Q. Are they ordinarily furnished by the power company, do you know?

A. They ordinarily are. The power company in this case refused to supply them, due to [89] shortages.

The Referee: Any other questions? You may step down.

(Witness Excused.)

## DAVID BRAZIER

called as a witness in behalf of Nelse Mortensen & Co., being first duly sworn, testified as follows:

### Direct Examination

By Mr. Diamond:

Q. Your full name is David Brazier?

A. David Brazier.

(Testimony of David Brazier.)

Q. And you live in Seattle?

A. That is right.

Q. What is your business, Mr. Brazier?

A. General contractor.

Q. What type of contracting are you engaged in?

A. General. All kinds of building contracting.

Q. How long have you been engaged in the construction business? A. About 40 years.

Q. And you are a member of the Associated General Contractors—— A. Yes, sir.

Q. ——of Seattle? Are you acquainted with this building over at Lake Washington Shipyards that we have been talking about? [90]

A. Yes, I am quite acquainted with it.

Q. What was your connection with the construction of this building?

A. I was general superintendent on the work.

Q. At the time it was constructed?

A. It was constructed, start to finish.

Q. Was it being constructed, or do you know, for the Defense Plant Corporation?

A. That is right. To start off with, on the first building, I am not sure whether it was or not, because it got into a Defense Corporation contract subsequently.

Q. When you say the first building, you are referring to a building near there but not this one?

A. That is right.

Q. This building was built afterwards and you were the general superintendent? A. Yes.

Q. Who was the contractor?

(Testimony of David Brazier.)

A. Atherton Construction Company.

(Blue prints were marked Mortensen's Exhibit No. 12, 13, 14, 15 for identification.)

Q. Mr. Brazier, handing you what has been marked as Mortensen Exhibit No. 12 for identification, I will ask you if you can tell us what this blue print represents. [91]

A. Those are the footing details of the fabricating building, the second fabricating building.

Q. Is that this building that we have been talking about here? A. That is right.

Q. And this is the building that you worked on?

A. Yes, that is right.

Q. Do you remember when that was that it was constructed, approximately?

A. Oh, I would say it was about '41 or '42, somewheres in there.

Q. Handing you what has been marked as Exhibit No. 13 for identification, I will ask you if you can tell us what that is.

A. Those are the walls and the general framing details of the same building.

Q. That is a blue print? A. That is right.

Q. And those are the prints that were used?

A. For the framing details, yes.

Q. Not the original prints, but the same information at the time you built the building?

A. That is right.

Q. And handing you Exhibit No. 14, I will ask

(Testimony of David Brazier.)

you if you can tell us what that is? That is also a blue print, is it? [92]

A. It is a blue print, yes.

Q. And what does that show?

A. It shows the truss details and the crane post and rail details; also some of the side wall details; also the outside craneway details, craneway vents.

Q. And handing you what has been marked as Exhibit No. 15, I wil ask you what that shows.

A. This shows a cross section of the crane posts and rails, also a cross section of the truss, the main trusses and the main posts, sidewall posts. Also section XX is the same, the bottom cores and the bracing, and detail B and A of the general truss work that was used.

Mr. Diamond: I'd like to offer Exhibits—I guess it is 12 to 15, inclusive, in evidence. [93]

* * *

The Referee: * * * They are admitted.

(Mortensen's Exhibits Nos. 12, 13, 14 and 15, blue prints, were received in evidence.)

Q. (By Mr. Diamond): Now, Mr. Brazier, looking at the Exhibits 12 to 15, I will ask you whether or not from these exhibits and your recollection of the construction there were some cranes constructed as a part of this building?

A. That is right, bridge cranes.

Mr. Franco: If the Court please, I am going to move that the answer be stricken.

(Testimony of David Brazier.)

The Referee: Just a minute. You don't mean to say that the crane was constructed by you?

A. Not the cranes were installed by us——

The Referee: Yes.

A. (Continuing): ——but we raised the posts and the crane rails for the cranes. [94]

* * *

The Referee: He asked you if those cranes were constructed at that time.

The Witness: They were constructed for that job, but not on the job. They were constructed by somebody, P & H Company, I believe.

The Referee: Maybe at some distant point?

The Witness: That is right, and brought on the job and installed on the job.

Mr. Diamond: That is right.

Mr. Treadwell: As much of his answer that states that they were constructed for the job, be stricken. [95]

The Referee: Well, they might have been, but they were not constructed there.

Q. (By Mr. Diamond): Mr. Brazier, do the plans show that the building was to include some cranes as a part of the building?

A. Definitely, right here.

Q. Are the foundations as shown there for the cranes the same foundations as for the building?

A. That is right.

* * *

Q. I will ask you whether or not the cranes were

(Testimony of David Brazier.)

installed in the building when you were out there working on the building. [96]

A. That is right, yes.

Q. Mr. Brazier, was there constructed a transformer vault at the time this building was being constructed?

A. That is right. There was a transformer vault constructed on the east side of the building.

Q. Was that part of your contract or the contract you were working on? A. Yes.

Q. Do you know what was, if anything, installed in the vault?

A. I actually didn't see anything installed in the vault.

Q. Was the electric contract part of your work there on the job?

A. I am not sure of that. I am not sure whether it was a part of the general contractor's contract or not, although we supervised the electrical contract.

Q. What kind of foundations were built for the cranes? A. Reinforced concrete.

Q. Would you say they were or were not permanent type? A. They were permanent type.

Q. Mr. Brazier, can you tell us whether or not the construction and installation of the cranes was such as to become a permanent part of the building? [97]

* * *

A. Well, it would be a part, a permanent part of the building if the building was a part of the steel

(Testimony of David Brazier.)

fabricating shop. But at the same time, the building wouldn't fall down if you took the cranes out.

Q. (By Mr. Diamond): Mr. Brazier, when you are constructing a building and an elevator, that elevator can also be removed, can it not? [98]

A. That is right.

* * *

(Blueprints were marked Mortensen's Exhibits Nos. 16 and 17 were marked for identification.)

Q. Mr. Brazier, do you know what this building was constructed for, the purpose of it?

A. Yes, steel fabricating.

Q. Handing you what has been marked as the Exhibit No. 16, I will ask you if you can tell us what that is. A. Yes, that is the bending slab.

Q. Well, it is a blueprint, isn't it?

A. Blueprint.

Q. And what is a bending slab?

A. Well, a bending slab is a series of slabs with two inch scar holes set in them, and set in series on concrete footings, and they bend metals on the slab by inserting dowels and then bending the metal around the dowels on the slab.

Q. Was that built as a part of the construction of this property? A. That is right. [99]

Mr. Diamond: I offer 16 in evidence.

* * *

The Referee: * * * It will be admitted as part of the building at the time.

(Testimony of David Brazier.)

(Mortensen's Exhibit No. 16, blueprint, was received in evidence.)

Q. (By Mr. Diamond): And handing you what has been marked as Exhibit No. 17, I will ask you, Mr. Brazier, to tell us what that is.

A. That is a blueprint of a joggling press foundation. And we installed that in the same building.

Q. At the same time?

A. At the same time, yes.

Q. These last two exhibits are drawings which were prepared by the engineer who prepared the other drawings? [100] A. That is right.

(Mortensen's Exhibit No. 17 received in evidence.)

Q. Mr. Brazier, do you recall the construction of the sprinkler system in the building?

A. I recall a sprinkler system being installed but I didn't supervise the sprinkler installation. It was installed by W. Beggs & Company, a part of Atherton's contract, I believe.

Q. Do you recall that wiring was installed in the building?

A. Wiring was installed in the building, yes, by the Maritime Electric, as a part of Atherton's contract.

Mr. Diamond: You may inquire.

(Testimony of David Brazier.)

Cross-Examination

By Mr. Treadwell:

Q. Do you have a full blueprint of all the craneways? A. No, I haven't, sir.

Q. Where did that craneway run to, do you know?

A. Well, there was one crane rail or runway run the length of the building on the west side, a 15-ton crane. And two run on the east side, and one of them extended out into the yard for a certain number of bents. I just don't recall how far it went outside the building.

Q. Was the purpose of those to pick up ship plates, or something outside of the building and bring it into the [101] building and it was treated and then carried back out to the ship ways?

A. Yes, that is right, picked up by the cranes and taken out to the outfitting docks.

Q. The craneway, then, was rather a network of overhead rails, is what it was?

A. Well, just straight lines, straight lines right out to the pick-up yard.

Q. And the crane was in the building with only a small part of the craneways that were actually constructed?

A. Well, of course in that building that was all the craneways that was constructed in that building.

Q. Well, the craneways actually ran well outside the building?

(Testimony of David Brazier.)

A. On the east side they run right out over crane beds.

Q. How many feet do you think they ran outside?

A. Oh, at least a couple of hundred feet, anyway.

Q. Outside the building?

A. Yes, It is about ten years since I did that and I have almost forgotten it.

Q. Those craneways ran out to the ship ways?

A. They ran right out to the plate yard, and also the pick-up yard.

Q. So the cranes then would pick them up from the pick-up yard, where the raw plate would be brought, and it would [102] be brought into the building by crane for treatment, and then taken out of the building for installation?

A. Then taken right out the same way to the pick-up yard, where they picked up the cherry pickers.

Q. And stopping in the building was only one process in the handling of that plate?

A. That is right, for that building.

Q. The craneway in no way forms part of the structural support of the building, does it?

A. Not of the support of the building, no.

Q. When you originally built the building was it closed on the north end, do you recall?

A. It was closed on the south end, as I remember, the south and the east, as I remember it.

Q. And the west and the north walls——?

A. Were open.

(Testimony of David Brazier.)

Q. ——were open, and that is where the cranes ran? A. That is right, yes.

Mr. Treadwell: I have no further questions.

Mr. Franco: I have no questions, your Honor.

Q. (By the Referee): You say you haven't seen the building for ten years?

A. No, it is about ten years since I saw it.

Q. (By the Referee): Of course the wiring may be altogether different now? [103]

A. It could be.

The Referee: That is all.

Mr. Diamond: Thank you, Mr. Brazier. You may be excused permanently.

Mr. Treadwell: Yes.

(Witness Excused.)

(Discussion off the record.)

(Whereupon, at 4:45 o'clock p.m., an adjournment was taken until 2:30 o'clock p.m., Tuesday, November 19, 1952.) [104]

November 19, 1952; 2:30 P.M.

DON HENDRICKSON

called as a witness in behalf of Nelse E. Mortensen & Co., being first duly sworn, testified as follows:

Direct Examination

By Mr. Diamond:

Q. Your name is Don Hendrickson?

A. Yes.

(Testimony of Don Hendrickson.)

Q. Don, where do you live?

A. I live at Kirkland.

Q. And what is your line of work, Mr. Hendrickson? A. Construction.

Q. And how long have you been in the construction field or business? A. About 15 years.

Q. You are presently employed? A. Yes.

Q. In what capacity?

A. Superintendent, Nelse Mortensen Company.

Q. You are presently working in this building that we have been talking about?

A. That is right.

Q. And how long have you been working in that building? [105]

A. Ever since we purchased it. That was along in November of last year.

Q. And you are superintendent in charge of Mortensen's work out there?

A. That is right.

Q. You are their representative in charge of the building? A. That is right.

Q. Can you tell us something about your familiarity with building construction and buildings? Have you had any experience in that line?

A. Well, in the building field, I have been in practically all phases of it. Heavy construction and house construction, concrete construction.

Q. Are you quite familiar with this property out there that we are talking about?

A. Yes, I am.

Q. Will you tell us generally what it consists of?

(Testimony of Don Hendrickson.)

The main building, and then there is some outside.

A. It consists of the main large building, which is about 90x500, and then there is two smaller buildings, on the outside, one chipper shed and the other one used to be an acetyline shed at the time of the shipyard, is there. And then it consists of two docks and the two ways, two shipways.

Q. It runs right down to the water? [106]

A. Right down into the water, yes.

Q. Those docks and ship ways are wood?

A. They are wood, about 500 feet long, I would say, somewhere close to 500 feet long, and most of that is out over the water.

Q. And is there a concrete vault?

A. There is.

Q. And where is that?

A. On the east side of the building.

Q. And can you describe it just a little more? Is it attached to the building?

A. It is attached to the building, and it is about, somewheres close to 20x25 feet in size, and it is attached to the building.

Q. What is it made out of? A. Concrete.

Q. Solid? A. Yes.

Q. And what is it used for?

A. That is the vault, vault for your transformers. There is transformers in there, and your power panels are in there.

Q. Now inside the main building there are, of course, two cranes? A. That is right [107]

Q. Can you describe those cranes for us?

(Testimony of Don Hendrickson.)

A. Well, there is a 10-ton crane on the east side. And on the west side is a 15-ton. I wouldn't tell you the names, I don't know the names of the two.

Q. They are what as a layman I would call traveling cranes?

A. They are, they are traveling cranes.

Q. And they run the full length of the building?

A. They do, all the way.

Q. There has been some talk yesterday about one of the cranes running outside.

A. Well, it is, in the past it has run outside. But the building has been closed in where it can't run on the outside at present, and the tracks have been taken off from the other fellow's property. That is because that property doesn't belong to this property where it did extend out.

Q. You first went into that building at the time Mortensen purchased it? A. That is right.

Q. And those tracks and these cranes that you have described were in this condition then?

A. That is right.

Q. In other words, from the time Mortensen bought and owned it they did not run outside?

A. No. [108]

Q. Now calling your attention first to the docks at—I don't know how you described it, but the docks and the wooden runways?

A. Ship ways.

Q. Ship ways that are out there, is there some kind of a sprinkler system in connection with that?

(Testimony of Don Hendrickson.)

A. There is not a sprinkler system, but there is a hydrant system.

Q. Fire-fighting system? A. Yes.

Q. And will you describe that for us?

A. Well, there is a pump setting under the dock which feeds water to the piping that is piped all the way under both docks and under the ship ways. And there is various fire plugs, fire hydrants, along that that supplies the water to.

Q. And what is the purpose of that system of fire hydrants?

A. Well, that is the only protection you have for fire on all your ship ways, on your docks.

Q. Mr. Hendrickson, can you tell us whether or not that construction is permanent [109] construction?

* * *

A. Well, I would say that it was as permanent as you could put that type of piping in. It is fastened to hangers on the bottom side of the dock.

Q. Can you describe a little more for us just how it is built? How is it fastened? Does it go through girders or anything of that nature?

A. Yes, it would go through the girders and it runs the entire system, the entire length, and there are hydrants on both sides of the dock, and then there is pipes that run down underneath the ways and over to the other dock and up and down the other dock.

Q. Now you mentioned that there was a pump on it? A. Yes.

(Testimony of Don Hendrickson.)

Q. Will that system work without that pump?

A. No, it will not.

Q. Would it be of any use as fire-fighting equipment without the pump affixed to it?

A. It would not.

Q. Now going into the main building itself, is there a fire-fighting system or sprinkler system there?

A. There is a sprinkler system and also hydrants in there.

Q. Will you describe those to us, show how they are laid [110] and whether they are temporary or——

A. Your sprinkler system is connected to an 8-inch water line and it is a permanent installation, as near as could be. It is throughout the building. And it is a dry system, which is full of air until fire hits it. And it is connected to the other plugs, the water line is connected to the fire plugs. I think there is about three or four of those in the building, too.

Q. Now you speak of it being full of air. Is that air under pressure?

A. That air is under pressure.

Q. And when fire hits it what happens?

A. If the fire hits one of these valves, it lets the air out and when the air gets down to 25 pounds, it turns the water in. And if anything—if the air has got down below 25 pounds, why the water will come in automatically.

(Testimony of Don Hendrickson.)

Q. Those are sprinkler heads that we see throughout buildings often, warehouses?

A. That is right.

Q. And how is this air pressure maintained in this sprinkler system?

A. There is a compressor that furnishes air into it.

Q. That compressor runs with electricity?

A. It does.

Q. Electric motor attached to it? [111]

A. It is.

Q. Would this sprinkler system work without a compressor?

A. Well, it wouldn't work without air in there.

Q. Is there any other way of getting air in there? A. No, there isn't.

Q. Is that sprinkler system in the same condition now that it was when Mortensen bought the property? A. It is.

Q. Now there is some transformers and electric wiring and power available built in that building?

A. There is.

Q. Can you tell us, describe that and tell us what it is?

A. Well, there is the—the vault with four transformers in the vault. And on the outside of the vault there there is numerous ones, I wouldn't say how many. Some are closed in where you can't se them, and it is locked by the power company where you can't get in. But there are numerous ones outside.

Q. Is there a switch panel—— A. No.

(Testimony of Don Hendrickson.)

Q. ——inside?

A. Inside there is. Inside there is some of those large panels, units.

Q. All right. Will you just describe how the wiring is [112] connected, if it is?

A. Well, the wiring is connected there, that is quite a network. It would take some language that I wouldn't understand to describe it all. But there is —it is very heavy wiring coming into these switch panels and going from them under the ground in the conduit, most of them, to various parts of the building.

Q. When you say under the ground, is that wiring under the floor in the building proper?

A. Under the floor, yes. Most of it. Now there is a lot of wiring on the walls in the various places too, but most of your heavy wiring is underneath the floor.

Q. And what kind of a floor do you have in that building? A. It is asphalt.

Q. There are parts of it I think that are wood, are there not?

A. In the templet storage, where there are lavatories, is a wood floor.

Q. Are there other parts of it that are concrete?

A. Yes, in the end where my office is is a concrete floor, and the toilets are concrete floor.

Q. And there are of course lights in this building? A. There is.

Q. What kind of lights?

A. There is floodlights at—practically all over,

(Testimony of Don Hendrickson.)

about [113] every 30 feet all around the building.

Q. Are there little plugs where you can connect equipment and things?

A. Yes, on practically every column.

Q. Is there heavy-duty wiring available?

A. There is, at various places all over the building.

Q. Can you tell us, this wiring in comparison with other wiring that you have seen, is it in the nature of permanent construction or temporary construction?

A. I would say it was permanent——

Mr. Treadwell: Same objection.

A. (Continuing): ——permanent construction.

(No ruling.)

Q. (By Mr. Diamond): Now with reference to the cranes again, the cranes are supported on tracks running just below the ceiling, I believe, some distance below the ceiling? A. Yes, they are.

Q. And those tracks are supported with large timbers and foundations? A. Yes, they are.

Q. Can you tell me the kind of foundations which support——

A. (Interrupting): It is concrete.

Q. And can you tell us something about those foundations with relationship to the foundations of the building proper?

A. Well, they are part of the foundations for the [114] building proper. And the posts that hold up the cranes or the tracks are posts—I mean the

(Testimony of Don Hendrickson.)

timbers are bolted to the concrete. There is iron set in the concrete which the timbers are fastened to.

Q. Can you tell us whether or not the foundations for the cranes were built as a part of the foundation for the building itself?

* * *

Q. (By Mr. Diamond): Do you know whether or not the foundations are the same?

A. The foundations are the same.

Q. And how do you know that?

A. Well, you can see it is all one pour, all one piece.

Q. These cranes that we have been talking about are run by electricity? A. They are.

Q. Does that require considerable power?

A. It does.

Q. This wiring that you have described as coming from the vault, some of that runs to the cranes for running the cranes? A. It does. [115]

Q. Now you mentioned some sheds or additions to the building. Let's see if we can refer to them one at a time. There is, it looks like an addition that was built to the building which houses a boiler?

A. There is one on the east side that houses a boiler. It did house two.

Q. Can you describe that?

A. Well, the shed is practically the same construction as the building. It has a concrete floor in it. It is about 25x20, or about 30x20 on the east side, and it has a pit on the inside of it, concrete pit, with a boiler setting in the pit.

(Testimony of Don Hendrickson.)

Q. That pit, is that the foundation, or the support for the boiler?

A. Well, the boiler is setting down in. This pit is about 10 or 12 feet deep. And the boiler is setting down in it.

Q. Was this shelter an addition made for that boiler? A. I would say so.

Q. Can you tell us whether or not that shelter or addition is in the nature of permanent or temporary construction?

A. No, it is permanent construction. [116]

* * *

Q. (By Mr. Diamond): Now there is a heating plant of some kind in the property?

A. There is.

Q. Will you describe that for us, please?

A. Well, that is a million b.t.u. heating plant.

Q. What is it made out of?

A. It is metal, it is a metal plant, setting on the floor, [118] connected to an underground tank. And it has overhead air ducts that run down along the building, with openings for your air.

Q. Oil burning, is it?

A. It is an oil burner.

Q. And there is electric wiring connected to it?

A. There is.

Q. And I think you mentioned an oil tank?

A. There is an oil tank, and it is underneath the ground.

(Testimony of Don Hendrickson.)

Q. And do you know whether the pipes are above ground or underground?

A. It has a vent pipe that comes up and a filler pipe.

Q. You are speaking now of the oil tank itself?

A. Yes, a vent pipe that comes up and a filler pipe that comes up.

Q. And how is that connected to the oil burner?

A. By copper tubing.

Q. And where does that run?

A. What do you mean?

Q. Run under the ground or over it?

A. Under the ground.

Q. And when you say under the ground, you mean under the floor?

A. Under the floor of the building.

Q. Building? Mr. Hendrickson, you were out to the property [119] before Nelse Mortensen & Company bought it, were you not? A. I was.

Q. And did you see Mr. Goss out there?

A. I did.

Q. Was Mr. Slater with you? A. He was.

Q. Incidentally, does Mr. Slater work for or connected with Nelse Mortensen & Company?

A. He doesn't.

Q. And did you walk around the plant with Mr. Goss? A. I did.

Q. And can you tell us just what you did when you were out there, and what was your reason for being there?

A. We just went out to look the building over,

(Testimony of Don Hendrickson.)

see if that was a suitable site for the purpose that we were looking for. And Mr. Goss showed us the whole plant. We walked around with him, and looked at it all.

Q. What did he say to you, if anything, about his interest in it?

A. Well, as I recall, he showed us various things, told us that we would be free to use a lot of this stuff. [120]

* * *

A. He showed us various pieces of equipment that he said we were free to use, around the building.

Q. What did Mr. Slater say with reference to it?

A. I don't remember that anything was said at that meeting. We were just walking around mainly looking the building over. As far as any particular thing being said on our part, I don't remember of anything being said.

Q. Was there any major difference in the property at that time before Nelse Mortensen & Company bought it and its condition right after it was purchased by Nelse Mortensen?

A. None that I would——

Q. (Interrupting): In other words, the cranes were there and the heating plant was there?

A. That is right. [121]

* * *

Q. You told us about the boiler on the east side, and it was connected with this experimental what-

(Testimony of Don Hendrickson.)

ever it was he was using. What about the boiler on the west side? What did that connect with, or does it connect?

A. The boiler on the west side is the one that is connected to the experimental system.

Q. I see. And what about the one on the east side?

A. The one on the east side has a pipe; as far as I know, I don't think it is connected to anything at the present time, except a network of pipes. There is a network of steam pipes that goes out of it, a steam pipe that runs around the building, but I believe it is cut off out in the middle, or on the south end. It runs somewheres close to 200 feet to the south end and then across to the center and back up a ways. And I think at that point it is cut off where a press used to stand.

Q. Can you describe that boiler on the east side, generally, as to its size and purpose?

A. Well, it is a steam boiler. My experience with boilers is limited. It is a steam boiler, and it is about 8 feet in diameter, and about 10 feet high. Other than that,—it has automatic controls on it. Other than that, I——

Q. How is it fired? A. Oil fired. [122]

Q. And how does the oil reach the boiler?

A. The oil reaches the boiler through tubing which is under the ground, and it has a pump that pumps the oil into it.

Q. Do you know whether or not that comes from the same tank that ran into the heating plant?

(Testimony of Don Hendrickson.)

A. I do not, no.

Q. But it comes underground, that is on concrete? A. Yes.

Q. It comes through the concrete?

A. It comes through the floor.

Q. Would that be a concrete floor?

A. Well, in the portion where it is at, it is in concrete. But whether it is—there is a network of pipes in there, and to know which one is oil pipe and which one is something else, I wouldn't know.

Q. Is there electric wiring connected to this boiler? A. There is.

Q. Do you know whether or not there is steam available for use in this building?

A. At the present time there is steam available on that one boiler which is in operation all the time.

Q. How about this boiler? Could it make steam?

A. It would make steam, yes.

Q. You have been carrying on Nelse Mortensen's operations [123] in that building now for a little over a year, is that right?

A. A little over a year, yes.

Q. Have you been using the cranes?

A. We have.

Q. Have you had charge of them?

A. I have.

Q. Have you been oiling them, or do they need oiling? A. Yes, we have greased them.

Q. Taken care of them?

A. Took care of them.

(Testimony of Don Hendrickson.)

Q. Does the sprinkler system that you describe require some care and maintenance?

A. It requires air to be added to it every so often. We watch the pressure, that the pressure doesn't get down below around 35 pounds. If it gets down anywhere near that, why we put more air in it.

Q. By doing what?

A. By starting the compressor and opening the valve and letting air into the system.

Q. Have you been looking after that?

A. Yes, I have.

Mr. Diamond: You may inquire.

Cross-Examination

By Mr. Treadwell:

Q. Where is the compressor located that operates the fire [124] protection equipment?

A. It is on the east side of the building towards the—about 60 feet from the south end, somewheres in there.

Q. How big a compressor is it?

A. Well, it is a large one. It is about a 75-horse motor.

Q. How many horse motor is required to actually operate the fire protection system?

A. I wouldn't say. I wouldn't know.

Q. How often have you used that compressor?

A. About once a month for that purpose.

Q. Have you used that compressor for the purpose of inflating the fire protection equipment?

(Testimony of Don Hendrickson.)

A. We have.

Q. Now as a matter of fact isn't the compressor that operates the fire protection equipment located in the laboratory? A. What?

Q. Isn't the compressor that operates the fire protection equipment located in the laboratory?

A. It is not.

Q. Is there a compressor located in the laboratory? A. I couldn't tell you.

Q. Have you ever been in there?

A. I have. [125]

Q. Do you know what equipment is in there?

A. To some extent.

Q. Now with reference to the pump on the dock, fire protection pump: How big a pump is that?

A. I think it is a 25-horse motor.

Q. Have you ever had occasion to operate it?

A. No, I have not.

Q. How is it attached to the dock?

A. It is set on the plank foundation.

Q. Hanging under the dock?

A. It is underneath the main dock, yes. It is on a platform underneath the main dock.

Q. Just set on the platform?

A. Yes, it sets onto a platform.

Q. What type of pipe leads away from that pump?

A. I think it is a 4-inch pipe leading away, directly away from the pump.

Q. How is that pipe connected to the dock?

A. It is connected through pipe hangers.

(Testimony of Don Hendrickson.)

Q. And the pipe hangers just hang over the dock?

A. They are fastened to the dock, yes.

Q. Would the removal of the pump in any way interfere with the structural support of the dock?

A. It would not.

Q. Would the removal of the pipe in any way interfere [126] with the structure of the dock?

A. It would not.

Q. Would the removal of the pump or the pipe in any way damage the dock?

A. It would not.

Q. The fire protection equipment on the dock is connected with the Kirkland water system, is it not?

A. I don't believe it is.

Q. You don't know?

A. I don't know, but I am very nearly sure that it is not.

Q. But you don't know?

A. But I am not sure, no.

Q. With reference to the boiler on the east side of the building, there is an alcove there that contains the boiler you were speaking of?

A. There is.

Q. How many boilers were in that when you took possession of the property? A. Two.

Q. What happened to the other one?

A. It was taken out by Seattle Boiler Works.

Q. How long ago? A. Three weeks.

Q. Did Nelse Mortensen or you in any way interfere with [127] the removal of that boiler?

A. We did not.

(Testimony of Don Hendrickson.)

Q. Have you ever operated either of the boilers in the east alcove of the building?

A. We have not.

Q. Have you ever operated any of the boilers located on the property? A. We have not.

Q. And when you and Mr. Slater went to examine the property, what type of location were you trying to find? For what business?

A. A location for prefabricating houses.

Q. Were you at all interested in the equipment that was located in the building?

A. Some of it.

Q. Interested in any boilers?

A. Not necessarily.

Q. What type of heating plant is in the building now?

A. It is hot air, oil-fired hot air.

Q. Describe it.

A. Well, that is an oil-fired hot air heating system, million b.t.u.

Q. What is it, furnace?

A. Yes, it is a furnace.

Q. Is it sitting on the concrete, is that it? [128]

A. No, it is setting on the floor.

Q. Is it moveable?

A. Well, it was connected to duct work.

Q. Has it been moved? A. Yes, it has.

Q. Recently? A. Yes, sir.

Q. How often?

Mr. Diamond: Now, if the Court please, I think

(Testimony of Don Hendrickson.)

it was moved under stipulation that it would not be—the fact that it was moved would not be moved in this hearing. Is that correct, Mr. Treadwell—would not in any way affect the matter.

Mr. Treadwell: That is correct, we did have that agreement.

Q. When was it moved?

A. About a week ago, I believe, two weeks ago.

Q. Ever been moved prior to that time?

A. No, not since we have been there.

Q. How is the duct work attached to the building? A. Attached to the building?

Q. Yes. A. It is fastened to the columns.

Q. How is it fastened to the columns?

A. Well, it was in such a way that the men taking it [129] down were unable to salvage—would be unable to salvage much of it, taking it off.

Q. Well, it was just hung over the protecting board, is it not?

A. No, it is not. It is fastened to the columns.

Q. Did Nelse Mortensen ever use that furnace?

A. We did not.

Q. With reference now to the building sprinkler system, what size of pipe is that composed of?

A. It is an 8-inch pipe feeding into the main line, runs down into smaller pipes, clear down to 1-inch.

Q. Those 1-inch pipes are overhead pipes in the building? A. All overhead, yes.

Q. And how are those pipes fastened to the building?

(Testimony of Don Hendrickson.)

A. Through pipe hangers throughout the building.

Q. Are they in any way part of the structural support of the building? A. They are not.

Q. Would it in any way materially damage the building if they were removed?

A. It would not.

Q. Who has the key to the shelter in which the outside boiler is located?

A. There is no key. [130]

Q. How is that place locked?

A. Where the outside boiler is?

Q. Yes.

A. It is part of the building. It is open from the inside. There is no——

Q. I am talking now about the shelter on the west side of the building, southwest corner of the building.

A. It is the same thing. It is opened from the inside. There is no——

Q. You are thinking of the experimental boiler attached to the main building? I am thinking of the out-building.

A. The out-building, there is no boiler in the out-building. I have the key to the building.

Q. What is in that out-building?

A. There is a chipper in there.

Q. No, the one south of that.

A. Yes, there is a chipper in that one, too.

Q. Chipper in both of them?

A. Yes, there is a chipper in the south one and

(Testimony of Don Hendrickson.)

some other machinery which I don't know, and we use it for a gas house.

Q. You use it now—there is gas in there?

A. Yes.

Q. But you are not familiar with any of the equipment that is in there? [131]

A. The other machinery, I am not——

Q. (Interrupting): On the shed on the east side, on the northeast side there, there is located a large chipper? A. The northwest side.

Q. Northwest. How is that chipper fastened to the property? A. It is sitting on the dock.

Q. Just sets on the dock?

A. It sets on the dock there.

Q. Could it be removed without damage to the dock?

A. Yes, it could. There is holes through the dock where part of the thing is underneath it.

Mr. Treadwell: I have no further questions.

Mr. Franco: I have just one or two questions.

Cross-Examination

By Mr. Franco:

Q. Mr. Hendrickson, how long before Mr. Mortensen bought this building did you first hear that the building was available, just approximately?

A. Well, I would say it was not very long before they bought it.

Q. Just a few days or relatively short time?

A. Just when they bought it I don't know that, so I couldn't tell you. [132]

(Testimony of Don Hendrickson.)

Q. Well, how did the fact that this building was there or was available first come to your attention?

A. From Mr. Slater.

Q. And what is Mr. Slater's first name?

A. Robert.

Q. Robert Slater, S-l-a-t-e-r. And how did it happen that Mr. Slater called the existence of this building to your attention?

A. Well, we were looking for one, for prepaneling houses.

Q. And why did Mr. Slater call it to your attention? That is what I want to know. Why did he call it to your attention?

A. I was in charge of prepaneling the houses.

Q. I see. Well, how did it happen that Mr. Slater learned of the building and turned the information over to you? That is what I am particularly interested in finding out.

A. How he learned of the building, that I wouldn't know.

Q. What association, if any, was there between you and Mr. Slater at that time?

A. There was no association between us.

Q. Well, how did it happen that Mr. Slater turned that information over to you? There must have been a reason for it. Now tell us what the reason was.

A. Would you rephrase the question? [133]

Q. Well, I think the question is clear. What reason was there for Mr. Slater calling to your attention the existence of this building?

(Testimony of Don Hendrickson.)

A. Well, I don't know any—we were building houses on the outside and we were looking for a building, inside.

Q. Well, you say that Mr. Slater had no connection with either you or with Cliff Mortensen & Company, Inc. And yet Mr. Slater comes to you and says the building is available for this prepaneling purpose. Is that essentially what happened?

A. That is.

Q. Well now, can you tell me why Mr. Slater would come to you with that information? Why would he go to that trouble?

A. I couldn't tell you why, was——

Q. Well, do you know whether or not he had been instructed by Mr. Mortensen to go out and find a building or find a location?

A. I couldn't tell you that.

Q. You don't know that? A. No, I don't.

Q. And do you know what Mr. Slater's occupation was at that time? A. I do not.

Q. Had you ever met Mr. Slater before that time? A. I had. [134]

Q. And what was his occupation prior to that time, then? A. I do not know.

Q. I see.

Mr. Diamond: I can answer your question if you just merely want an answer.

Mr. Franco: No, I am trying to get some information from this witness.

Q. And as I understand, you and Mr. Slater went out to see the property and meet Mr. Goss?

(Testimony of Don Hendrickson.)

A. We did.

Q. And you both conversed with Mr. Goss at that time? A. We did.

Q. And Mr. Goss showed you around the plant?

A. He did.

Q. And Mr. Slater was with you at all times?

A. Yes, he was.

Q. Did Mr. Slater participate in the conversation that occurred at that time?

A. At that time, at the meeting that we had that time, we were just merely looking at the building. I don't think there was much conversation except Mr. Goss showing us around the building.

Q. All right. Now how long were you there?

A. Maybe thirty minutes.

Q. I see. And did you and Mr. Slater drive out there together? [135] A. We did.

Q. And in whose car?

A. That I couldn't remember.

Q. You don't remember that. Did you have any discussion at all with Mr. Slater as to why he was interested in procuring this building for Mr. Mortensen? A. I did not.

Q. You never asked him any questions?

A. I am in charge of prepaneling the houses. At the time that we went out there I had been home for ten days, and I had just came back. And I went out there the same day I just came back. And what had transpired in the time that I was gone, I had no idea.

(Testimony of Don Hendrickson.)

Q. You had no idea? You had met Mr. Slater before but you didn't know what he did?

A. No, I don't.

Q. Where had you met him?

A. I had met him at Mortensen's.

Q. How many times had you met him before this occasion? A. I don't know.

Q. Well, was it once, twice, a number of times?

A. No, I met him several times.

Q. And did you ever seek to ascertain what his occupation was, what he did for a living? [136]

A. I did not.

Q. Not a very inquisitive chap. Did Mr. Slater tell you what he was doing in this connection? Did he say anything to you? A. He did not.

Q. And yet you went out to the plant with him and looked the plant over and spent a considerable amount of your time?

A. Yes, we were definitely interested in looking for a building.

Q. Didn't you assume at that time, Mr. Hendrickson, that Mr. Slater had some sort of authorization from Mr. Mortensen to find a plant for him?

A. I didn't know.

Q. Well, didn't you assume it at that time?

A. I had looked at other buildings before.

Q. Well, had Mr. Slater ever procured other plant sites for Mr. Mortensen?

A. No, not that I know of.

Q. Do you know whether he had done any previous work for Mr. Mortensen?

(Testimony of Don Hendrickson.)

A. I don't know.

Q. Did you have any reason at all to think that Mr. Slater didn't have any authority to procure this building? A. I did not.

Mr. Franco: No further questions. [137]

Mr. Diamond: That is all.

The Referee: You may step down.

(Witness excused.)

Mr. Diamond: That is all. [138]

* * *

LEOPOLD M. STERN

called as a witness in behalf of Seattle Association of Credit Men, being first duly sworn, testified as follows:

Direct Examination

By Mr. Franco:

Q. Your name is Leopold M. Stern?

A. Yes.

Q. And you are an attorney and counsellor?

A. One or the other. I don't know whether I am both.

Q. And did you have occasion during the month of November [139] of 1951, to enter into certain negotiations concerning the sale or assignment to Nelse Mortensen & Company, Inc., of certain rights of redemption owned by the Seattle Association of Credit Men?

A. I participated in some negotiations. I didn't initiate them.

(Testimony of Leopold M. Stern.)

Q. And will you—in connection with what property were the negotiations?

A. The realty which was the subject of foreclosure proceedings and sale under a mortgage made by the Puget Sound Products Company to—I forget the name of the government agency, whether it was R. F. C. or what it is.

Q. Handing you what has been admitted as Mortensen's Exhibit No. 4, is it that proceeding in connection with which the redemption or the negotiations took place?

A. Yes, it is the property involved in this foreclosure proceeding, the record of which you have just showed me.

Q. Will you relate to the Court to the best of your recollection generally what transpired immediately prior to the execution of the assignment of certificate of redemption which is a part of Mortensen's Exhibit No. 4? [140]

* * *

Q. (By Mr. Franco): Any negotiations that occurred with either Mortensen or its representatives or agents prior to the time that the actual assignment was made.

A. I never met Mr. Mortensen. My negotiations or contacts were entirely with Mr. Herman Howe. I think Mr. Diamond at the time was absent from the city.

* * *

(Testimony of Leopold M. Stern.)

Q. (By Mr. Franco): Was there ever any discussion with anyone representing Mr. Mortensen of the personal property that was in this particular plant?

* * *

A. The discussion pertained only to the realty that was involved in the foreclosure. There was no——

Q. And pursuant to the negotiations this portion of Exhibit 4 entitled "Assignment of Redemption" was executed. Is that correct? A. Yes.

Mr. Franco: No further questions.

Mr. Diamond: No questions, Mr. Stern, thank you.

(Witness excused.) [143]

W. L. GRILL

called as a witness in behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Treadwell:

Q. Will you state your name, please?

A. W. L. Grill.

Q. And Mr. Grill, calling your attention to July of 1949, what position did you hold with the Puget Sound Products Company?

A. I was the secretary; also a director, I believe.

(Testimony of W. L. Grill.)

Q. What was the financial condition of the Puget Sound Products Company in July, 1949?

A. Well, it was out of funds, out of cash. It owed considerable money about that time, it gave a mortgage to U. S. Sheetwood Company and one to the Seattle Association of Credit Men.

Q. Now with reference to the chattel mortgage executed to the Seattle Association of Credit Men—I hereby refer to Trustee's Exhibit 10—I will ask you to state how many mortgages in trust were executed by the Puget Sound Products Company to the Seattle Association of Credit Men?

A. Well, it is my recollection there was one on the real estate and one on the personal property.

Q. Will you just check? [144]

A. There appears to be one on the real estate and one on the personal property.

Q. Well, check the documents. Did you execute them?

A. Well, I executed the one on the real estate mortgage and one on the personal property.

Q. Who did you negotiate with at the Seattle Association of Credit Men? A. Mr. Grisvard.

Q. And were those two documents executed simultaneously, the two mortgages?

A. Well, to the best of my recollection.

Q. And is it the trust mortgage covering the real estate? Was it the right of redemption under that

(Testimony of W. L. Grill.)

mortgage that was exercised by Nelse Mortensen & Son in acquiring the property in question?

A. It was.

Q. Did you handle that transaction?

A. No, I didn't handle the transaction. I think it originated with me, however.

Q. In what way?

A. Well, the Puget Sound Products Company was endeavoring to sell the real estate. The government had notified it, and notified me, that when the period of redemption would expire that they would have all the property removed from the premises. In other words, they would have to get off, [145] they wouldn't renew it. So the Company was making an effort to sell the property and apparently—and Mr. Slater had contacted, on behalf of Mortensen & Company, had contacted Mr. Worth Goss.

Mr. Howe: Are you talking of your own knowledge or something you were told?

The Witness: No, I am talking somewhat of my own knowledge. I talked to Mr. Slater at the plant myself. And I talked to you about the Mortensens, and that is my own knowledge.

Well, we got down to what I know of my own knowledge altogether then, if you want to know that. I was over to the plant, and Mr. Slater came over there on one occasion. And I went around the plant with him, with Mr. Worth Goss. And he said that it looked just exactly like the set-up that Mortensen & Company wanted.

(Testimony of W. L. Grill.)

Mr. Worth Goss—well, we walked all around the plant at that time. And I gathered from his enthusiasm plus his attitude that he was one of the high directors in the company, Mortensen Company.

And from that point I think I talked to you to see how the thing was proceeding on one occasion or several occasions. And I think by that time you had gotten some report, either title insurance report or some report on the property. And you advised me that the liens and things against the [146] property were such that you couldn't proceed to purchase the property. So I had spoken to Worth Goss. He also had that information. And I said, "There is only one way this could be done if you want to get the property, and that was to redeem it from the Seattle Association of Credit Men." So I told you about it. And you apparently looked into it, and later reported to me one time that the title insurance people were looking it up, and later you said they would proceed, that that method could be adopted.

And I talked to you about this thing, initially, when you considered the purchase, and I talked to you about it as a matter of redemption. I also told you the Association was the people to deal with, and I talked to Mr. Grisvard about it, and I talked to both Mr. Stern and—and arranged that they would make the transfer and make the deal.

I told the Association that the only benefit would be that we were to have a six months' free rental period there, told Mr. Stern that also. The thing

(Testimony of W. L. Grill.)

was closed up before I knew it. I wasn't handling the closing of it. But it was closed so rapidly.

Mr. Diamond was out of town, and my recollection is this, that the — I may be mistaken — that the period of redemption was going to expire on a Sunday. Technically it might be a Monday. And the thing was held up for a few days because Mr. Diamond was out of town. And he came back and [147] I think he either put in your notice of redemption on a Friday or a Saturday, because I know the government had some question whether they would have to take it or something of that kind. So that I know of my own knowledge.

* * *

Q. (By Mr. Treadwell): Calling your attention, Mr. Grill, to a mortgage executed between Puget Sound Products Company and United States Sheetwood, do you have a copy of that mortgage?

A. I do have, yes.

Q. When was that?

A. This was executed on the—I think—the 27th of June.

(Photostat was marked Trustee's Exhibit No. 18 for identification.)

Q. Mr. Grill, handing you what has been marked for identification as Trustee's Exhibit 19, I will ask you to state what that is.

A. Well, it consists of several documents here, primarily. It begins with a chattel mortgage from

(Testimony of W. L. Grill.)

the Puget Sound Products Company to the United States Sheetwood Company, covering certain personal property; also several affidavits for [148] renewal, signed by myself, as well as an assignment from the United States Sheetwood Company to me.

Q. This is a certified copy of a document on file?

A. Those are certified copies of the documents on file in the County Auditor's office.

Mr. Howe: If the Court please, we object to this as having no bearing whatever upon the case. I think the Court has already found that the mortgage was void, anyhow.

Mr. Treadwell: It is offered for the purpose of showing the intent of the Puget Sound Products Company in regard to the machinery and equipment involved in this proceeding.

The Referee: It is a certified copy of a public record. I think it will do no harm to admit it. What its probative value is, I am of some doubt.

Mr. Treadwell: The Trustee offers it.

The Referee: It will be admitted in evidence.

(Photostat above referred to was received in evidence as Trustee's Exhibit No. 18.)

(Testimony of W. L. Grill.)

TRUSTEE'S EXHIBIT No. 18

3916330

## CHATTEL MORTGAGE BY CORPORATION

Know All Men by These Presents, That Puget Sound Products Co. of Seattle, Washington, the first party, in consideration of Twelve Thousand Five Hundred ($12,500.00) Dollars, the receipt of which is hereby acknowledged, does hereby Grant, Bargain, Sell and deliver unto United States Sheetwood Company, the second party, the following described personal property now located and kept at plant of First Party in the City of Houghton in the County of King and State of Washington, to wit:

1—15-ton Bridge Crane
1—10-ton Bridge Crane
1—350-ton Joggling Press
2—Acetylene Generators
1—Auxiliary Fire Pump
1—Worthington Air Compressor
6—Jib Cranes
1—Trumbull Switchboard
13—Transformers:
3—200 KVA—DPC Nos. 403-7, 403-8, 403-9
6—100 KVA—DPC Nos. 403-13, 403-14, 403-15, 403-22, 403-28, 403-31.
1—75 KVA—DPC No. 403-21
3—50 KVA—DPC Nos. 403-18, 403-19, 403-20.

(Testimony of W. L. Grill.)

and being all the property of like description located at that place or belonging to said first party.

This Bill of Sale is intended as a Mortgage to secure the payment of Twelve Thousand Five Hundred and no/Dollars, Lawful Money of the United States, together with interest thereon in like Lawful Money at the rate of 5 per cent per annum from date until paid, according to the terms and conditions of one certain promissory note bearing even date made by First Party payable to the order of the second party and these presents shall be void if such payment be made according to the terms and conditions thereof.

But in case of default in the payment of any part of the principal or interest of said note according to the terms thereof or of abandonment of the chattels hereby mortgaged or of the premises where they are kept the second party may declare the whole amount secured hereby at once due and payable and may thereafter in any manner provided by law foreclose this mortgage for the whole amount of the principal and interest whether the same shall be then due or not.

And in any suit or other proceedings for the recovery of any part of the principal and interest, on either said note or this mortgage, it shall be lawful for the second party to include the amount that may be recovered (in addition to costs provided by law) as attorneys' fees, the sum of a reasonable sum of Dollars, as well as all payments that the second

(Testimony of W. L. Grill.)

party, its executors, administrators or assigns may be obliged to make for it or their security by insurance, or on account of any taxes, charges, incumbrances or assessments whatsoever on any part of said personal property.

In Witness Whereof, the first party has caused its corporate name and seal to be hereto affixed by its officers thereto authorized, on this 27th day of June, 1949.

[Seal] PUGET SOUND PRODUCTS COMPANY,

/s/ O. P. M. GOSS,
President.

Attest:

/s/ W. L. GRILL,
Secretary.

[Acknowledgment and affidavit of good faith attached.]

State of Washington,
County of King—ss.

I, Robert A. Morris, Auditor of King County, State of Washington, and ex officio Recorder of Deeds, and the legal keeper of the records hereinafter mentioned, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a Chattel Mortgage, Vault File Nos.

(Testimony of W. L. Grill.)

2447063 & 2854504, Aud. Rec. No. 3916330 as of record in this office in Vol. 71 of Chat. Mtgs. Page 651, Records of King County.

Witness my hand and official seal this 25th day of June, 1952.

[Seal] ROBERT A. MORRIS,
Auditor of King County,
Washington.

By /s/ A. A. LIBEAN,
Deputy.

No. 8939

Received in evidence November 19, 1952.

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Q. (By Mr. Treadwell): Mr. Grill, calling your attention to the year 1947, and the early part of 1949, when the Houghton property was acquired by Puget Sound Products Company, did you handle that transaction?

A. I handled the closing of the transaction. I handled the legal end of it from the standpoint of Puget Sound Products Company, examining the documents and passing upon them, [149] and passing them on to the government.

Q. Did you examine the first mortgage and deed submitted to the Puget Sound Products Company by the War Assets Administration?

A. I did. I examined the chattel mortgage and the real estate mortgage, as well as the deed.

Q. Did you examine them?

(Testimony of W. L. Grill.)

A. I examined them, yes. And I objected to the form of them.

* * *

A. I objected to both mortgages because they did not set forth the transactions between the parties.

Q. In what respect?

A. Because the way they were prepared originally, they [150] covered after-acquired property.

* * *

A. I raised the objection to the specific language by a letter, and after some period of time the government recognized it and redrafted the instruments and brought it back and eliminated all right to any future—any after-acquired property. Looking specifically to the property upon which they had their mortgages, and which they sold, purchase money mortgages.

Q. That is the mortgage which was drafted by the War Assets Administration and contained after-acquired property clause? A. Yes.

Q. As a result of objections raised by you, those clauses were deleted?

A. They were deleted, yes.

Q. And the document as finally agreed upon is the document in evidence here? A. Yes. [151]

Q. (By Mr. Treadwell): Mr. Grill, were your objections to the proposed mortgages by the War Assets Administration [152] conveyed to the War Assets Administration by letter?

(Testimony of W. L. Grill.)

A. I wrote them a letter setting forth the objections, yes.

(Copy of letter was marked Trustee's Exhibit No. 19 for identification.)

Q. Handing you Trustee's Exhibit 19, I will ask you to state what that is.

A. That is a copy of the letter that I wrote to the——

* * *

A. (Continuing): ——attorney for the War Assets Administration with relation to the——

* * *

Q. (By Mr. Treadwell): Was that letter received by the War Assets Administration, to your knowledge?

A. Well, they answered it, and I discussed it with them by phone, Mr. Anderson.

Q. Handing you what has been marked for identification as Trustee's Exhibit 20, I will ask you to state what that is.

A. This is a partial reply to the letter in which they [153] had redrafted the documents and sent new documents.

* * *

Q. (By Mr. Treadwell): Was that letter received by you? A. It was received by me.

Q. And from whom?

A. From the department handling it—the War Assets Administration, by Mr. Anderson, chief legal division.

(Testimony of W. L. Grill.)

Q. And that letter was in response to the letter you wrote them?

A. Forwarding new documents.

* * *

The Referee: The objections will be overruled. The letters will be admitted in evidence.

(Trustee's Exhibits 19 and 20, letters, were received in evidence.)

## TRUSTEE'S EXHIBIT No. 19

March 15, 1948.

Harold W. Anderson, Attorney,
War Assets Administration,
Seattle 1, Washington.

Dear Mr. Anderson:

We are returning herewith the notes and mortgages which you forwarded to us for execution by the Puget Sound Products Co.

We request the deletion of the language contained in the third paragraph of each of the notes, to wit:

> "Said mortgage also provides for the mortgaging of after-acquired property added to said mortgaged property or replacing said mortgaged property;"
> and
>
> "Said mortgage also provides for the mort-

(Testimony of W. L. Grill.)

gaging of after-acquired property becoming a part of said plant."

We also respectfully request the deletion of the language hereinafter set forth in the first paragraph on page 3 of the real estate mortgage, to wit:

"In addition to the real property hereinabove described, this indenture also covers and includes all other property of like nature to that hereinbefore described which may hereafter be acquired by the Mortgagor for use in the plant conveyed. And the Mortgagor now convenants to: (a) Notify the Mortgagee immediately of the acquisition of any such additional property, and, (b) if requested by the Mortgagee, to execute a further mortgage or mortgages in terms similar to these presents, covering such after-acquired property;"

and the language set forth in the chattel mortgage, being the last paragraph on page one of the chattel mortgage and continued on page 2, as follows:

"In addition to the personal property, machinery and equipment hereinafter described, this indenture also covers and includes all other property of like nature to that hereinafter described which may hereafter be acquired by the Mortgagor for use in the plant of the Mortgagor. And the Mortgagor now covenants to (a) Notify the Mortgagee immediately of the acquisition of any such additional property and, (b)

(Testimony of W. L. Grill.)

if requested by the Mortgagee, to execute a further mortgage or mortgages in terms similar to these presents, covering such after-acquired property."

It is the writer's understanding that the purchase money mortgages which we were to execute and deliver were to cover only the property we were purchasing from the War Assets Administration. We informed the seller that we expected to place a substantial amount of machinery and equipment on the premises and that this machinery and equipment was not to be covered by said purchase money mortgages and this was agreeable to the seller.

The Puget Sound Products Co., in constructing a plant for the manufacture of a new product and while it appears amply financed to construct the initial plant, nevertheless it might be necessary to borrow money to finance the production and if so, the company would have to use the plant, machinery and equipment as security therefor.

The original down payment has been made to the Government and in addition the property has already been substantially improved. A large building on the property was used as a fabricating plant for the shipyard. It was practically open on one end and one side. This has been closed, using large doors as a means of ingress and egress. The addition, the plant water system has been hooked up to the Kirkland water supply, both for fire purposes

(Testimony of W. L. Grill.)
and other uses. This item alone possibly cost $2,000 but means a substantial saving on fire insurance.

The floor in this building, where it had a floor, consisted of an asphalt pavement laid immediately over earth. The company is placing some heavy equipment in the building and in order to properly foundation the same, it was necessary to lay cement slabs to which the machinery will be fixed by bolts. Consequently, both the machinery and the foundations can be readily removed from the premises with no injury to the building.

From the foregoing you can readily understand the position of the company. We would, therefore, appreciate very much if you would redraft the instruments to conform to our understanding.

Thanking you for your courtesies in connection with the transaction, we are

Very truly yours,

W. L. GRILL.

WLG-s

Received in evidence November 19, 1952.

(Testimony of W. L. Grill.)

TRUSTEE'S EXHIBIT No. 20

War Assets Administration
1301 Second Avenue
Seattle 1, Washington

May 13, 1948.

In reply refer to:

RSE-RGC-L
Plancors 34 & 369
Lake Washington Shipyards
(Fee-owned portion)

Jones & Bronson,
Attorneys at Law,
Colman Building,
Seattle 4, Washington.

Attention: Mr. W. L. Grill

Gentlemen:

Reference is made to the purchase by your client, Puget Sound Products Company, of a portion of the Government-owned interest in the Lake Washington Shipyards property.

We enclose herewith the following documents:

Purchase Money Mortgage (original and one copy)
Promissory Note (original and one copy)

(Testimony of W. L. Grill.)

Purchase Money Chattel Mortgage (original and two copies)

Promissory Note (original and one copy)

Quitclaim Deed (Copy)

The originals of the Notes and Mortgages are to be executed by the President and Secretary of Puget Sound Products Company and the first carbon copy of the Purchase Money Chattel Mortgage should also be executed as a duplicate original. The corporate seal will, of course, be affixed to all executed instruments, as well as proper acknowledgment of the two Mortgages and the Affidavit of Good Faith in the original and duplicate original of the Chattel Mortgage, with notarial seals affixed. The extra copy of each instrument enclosed is for your file.

We also enclose a copy of the proposed Quitclaim Deed, inasmuch as a slight change has been made therein from the copy originally submitted to you, in that in Condition Third on Page 5 the following language has been added: "or until payment in full of the Promissory Notes and Mortgages covering the within sale, whichever occurs later."

The Notes and Mortgages, pursuant to authority of our Washington office, have been redrawn and should now meet with your approval.

Please return the executed instruments to this office, together with one check payable to the order of the Washington Title Insurance Company in the sum of $42.35, and one check payable to the order

(Testimony of W. L. Grill.)

of the King County Auditor in the sum of $9.00.[1] The first check will be used to purchase the necessary Federal documentary revenue stamps, which will be affixed to the Deed upon the recording thereof. The second check represents the estimated recording fees of the Deed and Real Estate Mortgage, together with the filing fee on the Chattel Mortgage. In the event the estimate is in excess of the actual fees, a proper refund will be made to you.

When the executed instruments are returned to this office, it will be necessary for your client to pay to War Assets Administration by check payable to the Treasurer of the United States the sum of $294.52, representing the pro-rate of 1947 general taxes, computed as of December 16, 1947.[2]

It is necessary that we be furnished with a copy, certified by the Secretary of the Corporation, of the Resolution of the Board of Directors of Puget Sound Products Company, authorizing the particular purchase and empowering the proper officials to execute the necessary instruments.

Upon receipt of the executed instruments, resolution and checks, as requested, the Deed and Mortgages will be placed of record. The Deed will be

---

[1][Stamped Paid]: Puget Sound Products Co., Seattle, Wn., No. 834 42.35-Wn. Title Ins. Co., No. 835 9.00—King Co. Auditor.

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[2][Stamped Paid]: Puget Sound Products Co., Seattle Wn., No. 836—Treasurer of the United States 5/14/48.

(Testimony of W. L. Grill.)

marked for mailing by the County Auditor after recording to your office or that of your client if you so direct.

Yours very truly,

/s/ HAROLD W. ANDERSON,
Chief, Legal Division,
Office of Regional Counsel.

Enclosures:
As listed

[In Margin]: 7151.20 — Assessed, 7068.41 — Adjusted.

Received in evidence November 19, 1952.

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Q. (By Mr. Treadwell): Mr. Grill, calling your attention to the foreclosure of the real estate mortgage commenced by the United States government, on or about the time that foreclosure was commenced was the chattel mortgage paid off, [154] purchase money chattel mortgage?

A. Well, the entire chattel mortgage was paid off. I don't know with relation to foreclosure. I don't have the dates in my mind. But the chattel mortgage was entirely paid, and the property released.

Q. You don't recall whether or not the real estate mortgage was in foreclosure at that time or not?

A. Well, I don't think it was. I think that they were threatening to foreclose it. And I think we

(Testimony of W. L. Grill.)

asked for some time. It wasn't long after that period, but it was in default about that time.

Q. How were the funds raised to pay off the chattel mortgage? [155]

* * *

A. The bulk of the purchase price was paid out of the sale of the personal property covered by the chattel mortgage.

Q. And that was—that sale was made at or about the time that the foreclosure of the real estate——

Mr. Diamond: He stated he didn't know.

A. Well, I know. One crane was sold sometime before for some five or six thousand dollars and that was applied. And then the large crane was sold for some $15,000, and some small items, and the balance was put up by the company, raised the funds to put it up from other sources. That mortgage given me was in effect for that purpose, practically.

Cross-Examination

By Mr. Howe:

Q. Mr. Grill, you were an officer of the Puget Sound Products Company at the time of the conversation you have testified about with reference to the property?

A. I was an officer, yes, of the Puget Sound Products [156] Company. As I say, secretary and director.

(Testimony of W. L. Grill.)

Q. And the first conversations that you had with me were with reference to a proposed sale by the corporation itself? A. That is correct.

Q. To my client? A. That is correct, yes.

Q. And then when it was found that that could not be consummated on account of the fact that they couldn't give title to the property, the conversations which you testified to with reference to redeeming through the Seattle Association of Credit Men were suggestions that you made to me as a matter in which we might obtain title to the property?

A. Yes.

Q. And thereby cut out some prior liens?

A. Yes, that is correct.

Q. The purchase of the property by Mortensen & Company was not made in any way through the Puget Sound Products Company as it eventually transpired?

A. Well, you couldn't have gotten it in any other way without the aid of the company. They were not interested in——

Q. (Interrupting): You mean that they conspired to permit us to go around and get it some other way?

A. I will say, you can draw a conspiracy—I will say yes, they conspired so that they might get the free use [157] of a part of the property and not have to move out for a period of six months. That was their object. There wasn't any profit to them to go to this trouble simply to get it turned over to you people. There was no profit in that.

(Testimony of W. L. Grill.)

Q. This mortgage which has been introduced in evidence, was originally given to the United States Sheetwood Company, dated June 27, 1949. Did you buy that mortgage from the United States Sheetwood Company? A. I did not, no.

Q. You notice it was dated June 27 and the assignment to you was made in August, 1949. What was the consideration for the assignment of the mortgage?

A. An indebtedness from the United States Sheetwood Company to me, as security for moneys the company owed me.

Q. And at the time this mortgage was given what relationship did that time have to the time when the mortgage of the United States was being foreclosed? Was it before or after?

A. Let's see. I don't believe the government mortgage was being foreclosed at that time. I could be mistaken. It happened either shortly before that or just shortly after, just about that time.

Q. The foreclosure at least was imminent at the time?

A. Yes, they were in default at that time.

Mr. Howe: That is all. No further questions.

(Witness excused.) [158]

Mr. Treadwell: The Trustee has nothing further.

Mr. Franco: We rest, your Honor.

The Referee: I will hear your argument.

(Short recess.) [159]

* * *

(Whereupon, at 4:50 o'clock p.m., the hearing was adjourned.) [161]

Monday, December 22, 1952, 10:00 A.M.

Mr. Treadwell: The Trustee is ready to proceed in the matter of Mortensens on the Order to Show Cause.

The Referee: In the matter of the Puget Sound Products, claim of Mortensen: It is my recollection that the hearing was had on that with reference to their claim to ownership of a substantial part of the machinery and equipment at the Houghton plant, and that a brief was submitted and memorandum decision rendered, and this is a continued hearing of that matter, with the undersanding that at this hearing we will hear and consider the claim of Mortensen & Co., for rental as an alternative claim, I presume, for rental of the premises for storage of the products of the trustee, on the plant, since they acquired title to the real estate and up to this time.

If that is a fair statement, you may proceed.

Mr. Diamond: If your Honor please, I think for the matter of the record, it ought to be made clear that this matter was set down specially by the Court for hearing at this time on the claim of Nelse Mortsensen & Co., for rent due from the trustee in bankruptcy for the use of the premises which [162] belong to Nelse Mortensen & Co. There are no pleadings, I don't believe, in the file, with reference to this claim because of the manner in which it was set down.

Your Honor, in your statement, said something about an alternative claim. I don't quite understand it. I don't think this is any alternative claim. This is a claim for rental of the real property of Nelse Mortensen & Co., for the period of time that the trustee was in use and possession of the real property of Nelse Mortensen & Co. It covers a period of about ten months, roughly speaking. I think the time, there will be no disagreement about that. The period begins when Nelse Mortensen & Co. obtained title to the real property and it terminates as of the time when a new lease was entered into with Mr. Heller, I believe, which started as of September 1, 1952. So we have approximately a ten-month period that the claim for rental is being made. [163]

* * *

DON HENDRICKSON

recalled as a witness in behalf of Nelse Mortensen & Co., being first duly sworn, testified as follows:

Direct Examination

By Mr. Diamond:

Q. State your name.
A. Don Hendrickson.
Q. And where do you live?
A. I live at Kirkland.
Q. You are employed by Nelse Mortensen & Co.?
A. That is right.
Q. And you have been working out at the shipyard plant? A. That is right.

(Testimony of Don Hendrickson.)

Q. How long have you been out there?

* * *

The Witness: It was along in November.

Q. (By Mr. Diamond): That is when you went out there? A. When I went in there.

Q. What is your position out there?

A. What?

Q. What is your position out there?

A. I am superintendent.

Q. Are you in charge of the property out [173] there? A. Yes, I am.

Q. Mr. Hendrickson, can you tell us what area was used by the trustee in bankruptcy or the Puget Sound Products in the building? Can you define the area or the portion of the building that was used by them?

A. Well, would you want it as of the time we went in there?

Q. Yes.

A. At the time we went in there, why it was all, the entire building had material all through it.

Q. And after you took over and started using a portion of it, what part of it did Puget Sound and the trustee use?

A. They still had the west half or the west side of the building, which is a little more than half of the building, at the time that we were operating.

Q. And what about the laboratory?

A. And they had the laboratory, except we had an office in one corner of the laboratory space, and

(Testimony of Don Hendrickson.)

the balance of it was theirs. We had a 20x30 office space out of it.

Q. Do you know whether the laboratory was occupied—who occupied it?

A. Well, Mr. Goss was in there. Who he was representing, Puget Sound Products, as I supposed. He was in there.

Q. Now this occupancy of one-half, the west half of the building, how long did that continue? [174]

A. Well, their stuff was in the west half of the building until this spring, practically all the time. We had gained a little room right around the north door during the winter, but the balance of the territory was all taken up with their stuff until late this spring.

Q. And at the present time how much space is being used by either Puget Sound or others than yourselves?

A. Well, their space at the present time is—they have about 21 feet along the west side of the entire building, and then they have a press and a laboratory, several boilers that are in the building yet.

Q. Are you familiar with who has the lease to that space out there now?

A. Well, I have seen the lease, yes.

Q. Do you know who it is with?

A. No, I wouldn't tell you who it is with.

Q. Handing you what has been marked as a lease with a diagram attached to it, I will ask you if that is the lease that you say you have seen before?

A. Yes, it is.

(Testimony of Don Hendrickson.)

Q. And does this show the property which is now under lease out there? A. Yes, it does.

Q. And you say the 21 feet along the east, is that this part marked here, all of those that are marked with the heavy [175] line along are the parts leased, is that right?

A. That is right, except for parts of this area and that one.

* * *

The Referee: It will be admitted.

(Lease with diagram attached was received in evidence as Mortensen's Exhibit No. 1 of December 22, 1952.)

## MORTENSEN'S EXHIBIT No. 1

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Mortensen's Exhibit No. 1—(Continued)

Shed and Storage Bin* on the blueprint of the "Plant Building—Houghton" dated 9-3-52, executed by Continental Eng. Co. and bearing the stamp of Lowell M. Palmerton, a copy of which blueprint is hereto appended as Appendix "A," in those certain buildings formerly constituting a part of the Lake Washington Shipyards located on the following described property:

In the County of King, State of Washington:

That portion of Government Lot 2, Section 17, Township 25 North, Range 5 E.W.M., and of the second class shorelands and of Block F, Lake Washington Shorelands, lying in front thereof, described as follows:

Beginning at a point on the westerly line of Lake Washington Boulevard 1902.66 feet southerly of, measured at right angles to, the northerly line of said Section 17; thence southerly along said westerly line 91.75 feet to the true point of beginning; thence on a line parallel with the north line of said Section 17, south 89°24'50" west 219.08 feet; thence north 0°35'10" west 16.70 feet to the southerly line of land conveyed to Alaska Terminal & Stevedoring Company by deed recorded under Auditor's file No. 3759121, records of said county; thence south 89° 24'50" west along said southerly line to the inner harbor line of Lake Washington; thence southerly

*[Initialed]: C.M.
N.M.
E.H.H.

(Testimony of Don Hendrickson.)

Mortensen's Exhibit No. 1—(Continued)

along said inner harbor line to intersect a line parallel with and 50 feet northerly of, measured at right angles, to the production west of the south line of the north half of the south half of the southeast quarter of the northwest quarter of said section 17; thence easterly along said parallel line to the westerly line of Lake Washington Boulevard; thence northerly along said westerly line 333.65 feet, more or less, to the true point of beginning.

and Lessor further leases to Lessee (1) the space located on the East side of the main building wherein are located the power transformers, there being six transformers located outdoors and three transformers located in the transformer vault, (2) the overhead blower pipe leading from the chipping shed to the main plant building, and (3) the space designated "Parking Lot" in Appendix "A" hereto attached, *for loading and unloading only** to the extent not utilized by Lessor.

2. Term: The term of this lease shall be one (1) year, commencing September 1, 1952, and ending August 31, 1953; provided, however, that in the event a plan of reorganization of United States Sheetwood Company and the Puget Sound Products Company has not been approved by the Federal District Court and all other interested parties by November 15, 1952, Lessee shall have the right to

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*Matter set in italics appeared as an alteration on original with initials C.M., N.M. and E.H.H.

(Testimony of Don Hendrickson.)

Mortensen's Exhibit No. 1—(Continued)

terminate the lease at any time thereafter, upon fifteen (15) days' written notice.

3. Rental: Lessee agrees to pay Lessor as rental the sum of Four Hundred ($400.00) Dollars per month, with rent payable monthly in advance in lawful money of the United States on the first day of each and every calendar month, and Lessee further agrees to furnish Lessor electricity, provided that the cost thereof does not exceed Fifty ($50.00) Dollars per month. In the event the cost of furnishing electricity to the Lessor exceeds Fifty ($50.00) Dollars per month, Lessor hereby agrees to pay Lessee the amount of the cost in excess of Fifty ($50.00) Dollars per month.

Lessor acknowledges receipt of Eight Hundred ($800.00) Dollars, Four Hundred ($400.00) Dollars of which is in payment of the first month's rent, and the balance of Four Hundred ($400.00) Dollars shall be credited in payment of the last month's rent due the Lessor.

4. Improvements: Lessee shall make no alterations or additions to the physical plant in which the premises are located without first obtaining the Lessor's consent; provided, however, that Lessee shall have the right to errect such equipment and machinery on the leased premises as he deems necessary in the prosecution of his business and such shall not be deemed to be an alteration or addition within the terms of this paragraph 4, and at the expiration

(Testimony of Don Hendrickson.)

Mortensen's Exhibit No. 1—(Continued)

of the original or any extended term hereof or any sooner termination of this lease, Lessee shall have the right to remove any and all machinery and equipment belonging to Lessee located upon the leased premises.

5. Repairs. Lessee shall not be obligated to repair any deterioration, damage or destruction of said premises, or any part thereof which is due to reasonable use, ordinary wear and tear, fire, earthquake, acts of the enemy, the elements, unavoidable casualties or matters beyond the reasonable control of the Lessee, or which results from defects in construction, whether latent or patent. Lessee shall return said premises to Lessor at the expiration of the original or any extended term hereof, or any sooner termination of this lease in the condition received, deterioration, damage or destruction due to any of the aforementioned causes excepted. In the event said premises, or any part thereof, deteriorate from or are damaged or destroyed by any of said causes, so that Lessee cannot fully enjoy said premises, and Lessee shall notify Lessor to that effect, the rental payable hereunder shall abate from date of such notification until such time as Lessor shall repair and restore said premises to a suitable condition, provided, however, that if Lessor shall fail to repair and restore said premises within sixty (60) days from date of said notification, Lessee may, at its option, either repair or restore said

(Testimony of Don Hendrickson.)

Mortensen's Exhibit No. 1—(Continued)

premises and withhold rentals until it has been reimbursed therefor, or cancel this lease without any liability to Lessor therefor.

6. Inspection. The Lessor or Lessor's agents shall have the right to enter said leased premises for the purpose of inspecting the premises at all reasonable times during the term of this lease.

7. Lessee and Lessor hereby grant each to the other the right of reasonable ingress and egress to and from the areas controlled by each of them respectively on the premises hereinbefore described in paragraph 1 hereof.

8. Assignment. Lessee shall have the right to assign or transfer this lease or any interest therein, in whole or in part, without the written consent of Lessor first obtained, to the Puget Sound Products Company and/or the United States Sheetwood Company, or to their successors in interest, in the event of reorganization of either or both of the above-entitled companies, or to any corporation or company in which Lessee shall have a substantial interest, otherwise Lessee shall not assign or transfer this lease or any interest therein, nor sublease the demised premises, in whole or in part without the written consent of Lessor first obtained.

In Witness Whereof, the parties hereto have here-

(Testimony of Don Hendrickson.)

unto set their hands and seals the day and year first above written.

[Seal] NELSE MORTENSEN & COMPANY, INC.,

By /s/ NELSE MORTENSEN,
President,

By /s/ [Illegible.]
Secretary,
Lessor.

/s/ EDWARD H. HELLER,
Lessee.

Received in evidence December 22, 1952.

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Q. (By Mr. Diamond): Now prior to the time that Edward Heller took over under this lease as the lessee, was there a larger area occupied by Puget Sound? A. Well, there was.

Q. And I think you told us before it was about one-half? A. Yes.

Q. The east half of this building?

A. The west.

Q. The west half?

A. The west half. In other words, running right along here, and from there on over (indicating), all last winter [176] all this was filled with their machinery and up in here, too.

Q. When you say "this," pointing to the dia-

(Testimony of Don Hendrickson.)

gram attached to Exhibit 1, you are referring to a line about the center of the building?

A. It is a little bit more than to the center. It is actually—it is a little over half of the building in width, about 55 feet, I would say in width.

Q. Who occupied the rest of the building?

A. We did.

Q. Now while we are on the subject, there are two cranes in this building, aren't there?

A. Yes, there is.

Q. Did Nelse Mortensen & Co. use both of them?

A. To a certain extent, yes.

Q. How much use was made of the cranes?

A. Well, the one on the east side was used quite a little this winter.

Q. That is the large one?

A. No, that is the small one. The large one has been used by us not very much, particularly last winter we had very little of any place you could use it.

Q. Were the cranes used by anyone else?

A. They were used by the Gosses' men.

Q. When you say that the small crane was used quite a little, could you fix it in a period of time something more [177] definite than that, days or weeks or months or something?

A. Well, I couldn't, no, not definitely, how long it was used. Last winter it was used quite considerable while we were working, and then we have been down several times where it has not had any use for quite some spells.

(Testimony of Don Hendrickson.)

Q. When you say "last winter," how many months do you refer to when you speak of the winter?

A. Well, I suppose there was about six months there that it was used quite considerably.

Q. Every day?

A. I would say some every day.

Q. You are referring to work days?

A. Working days.

Q. And about how much time each day would you be using it?

A. Well, that would vary. That would vary quite a little. It would be a little hard to say, because it would vary quite a lot.

Q. Could you give us some of the variances?

A. Well, depending on how fast we were going. Some days that it was going practically all day, and it would be other days where probably actually going over half the time.

Q. Now with reference to the large crane, can you tell us within the limits I have been talking about here what use you made of the large [178] crane?

A. Well, of the large crane, we have made very little use. We have used it to unload a few loads out of there, but very little use.

Q. Can you approximate the number of days or weeks or months that you used the large crane?

A. Well, it has come in lifts more than days. We have never used it for any period of a day or

(Testimony of Don Hendrickson.)

even very seldom of an hour steady. I mean, it is just so many lifts for unloading a truck or loading up a truck, that we have used it.

Q. Well, could you give us some idea of the number of lifts that you have used it?

A. Well, I wouldn't want to go down in the record, because I wouldn't have a number.

Mr. Diamond: You may inquire.

Cross-Examination

By Mr. Treadwell:

Q. How long have you been connected with Nelse Mortensen & Co.?

A. About a year and a half.

Q. And you are their superintendent now, I understand? A. I am.

Q. Do you know when Nelse Mortensen first started using the Houghton building that we are discussing?

A. Well, I don't know in my mind the exact date, but it [179] was in November last year.

Q. November of 1951? A. That is right.

Q. What business is Mr. Mortensen in?

A. Construction business.

Q. And what was that building used for by Mortensen?

A. For prefab, prefabricating panels.

Q. And what part of the building was used in November of 1951?

A. Well, the first two weeks or so of the time we

(Testimony of Don Hendrickson.)

were in there we were cleaning out the building. We weren't using it for building anything. We spent that time cleaning out space to use.

Q. Do you recall whether those weeks would be in November or not?

A. I would say that it would.

Q. And what space did you clean out?

A. We cleaned out the east side of the building.

Q. That is down the craneway?

A. Down the craneway.

Q. What was in there?

A. Well, there was a little of everything in there. There was pressed board and there was machinery.

Q. Property of the Puget Sound Products Company? A. That is right. [180]

Q. Machinery and equipment and material, was that it? A. That is right.

Q. What did you do with that?

A. Well, most of it was put back over on the other side, anywhere to get the——

Q. (Interrupting): Just put out of the way?

A. (Continuing): ——working space.

Q. That space to use? A. That is right.

Q. Were any discussions had with anyone connected with the Puget Sound Products Company relative to moving that machinery or equipment?

A. Well, at one time I was out there when they had told me that they would have it all cleaned out before we came in. When I came in about two weeks later, why it was just as it set. And they informed

(Testimony of Don Hendrickson.)

me at that time that they didn't have any manpower to clean it with.

Q. And what part were they to have cleaned for you? A. That I couldn't tell you.

Q. What part did you contemplate using when you first went in there?

A. Well, at the time that I went out there I contemplated we had the building. That was my assumption, that we had the entire building.

Q. Well, when you first went out, you just cleaned out, [181] though, the one tramway; is that it? A. That is right.

Q. And is that the part of the building that you used? A. That is.

Q. Who furnished the electricity while you were out there? A. The Gosses. It was as it was.

Q. They have always paid the electric bill, have they? A. They have.

Q. What does that bill run a month?

A. That I couldn't tell you.

Q. That area under the tramway, that is the small craneway, that was used to make prefabricated houses? A. That was.

Q. Did you use any other area in the building other than that?

A. Well, we had an office in one corner of where the laboratory was.

Q. When did you first go into operation and start the production of prefabricated houses, at Houghton?

A. Well, actually starting, it was somewheres

(Testimony of Don Hendrickson.)

close to around the first of December, I think, of 1951.

Q. In December of 1951? A. Yes.

Q. And how much of the area of the building was used in [182] December?

A. The east half, the east side.

Q. Have you ever used any more than the east half of the building? A. Yes, we have.

Q. What other parts of the building have you used?

A. Well, as we have got stuff moved out of the way, why we eventually got into a little bit on the west side. But last winter, during the last winter, that was practically filled with machinery.

Q. Well, whenever you wanted a little more space all you did was move some of the equipment out of the way? A. Yes.

Q. No one interfered with your moving the equipment or tried to prevent you from moving the equipment, did they?

A. Well, there was not much place to move it to.

Q. When you needed space you just moved the equipment out of the way and occupied the space you needed?

A. It got to where there was no more space. It was piled on top of each other, and as far as leaving anything in the middle, it was all taken up.

Q. Well, that was done—how long did that take you to move all that equipment where it is presently located, after you took over the property?

(Testimony of Don Hendrickson.)

A. Well, the room that we have on the west side of the [183] building, when we took that out of there this spring I couldn't tell you the exact time that it took us to take it out of there, but I know whenever we had a lull and we had some manpower, why we took out another bunch of them.

Q. That was the material scraps you moved out?

A. Material scraps, and also machinery.

Q. That you moved out onto the dock?

A. Yes.

Q. And that space you now occupy?

A. Yes.

Q. But whenever you wanted to occupy space you have always been able to move the equipment or move the material occupying it, and use what space you have needed in the operation of Mortensen & Company, isn't that correct?

A. Well, not always what we needed. It was always move what you see was available. The thing is, you never had the room to where you could set your plant up to the operation as you could see that you should have had. If the material hadn't have been in your way, why you could have set your plant up to much more efficiency.

Q. Well, did you ever request anybody to move the machinery?

A. Yes, I requested that it be moved.

Q. Who did you request, make that request of?

A. Mr. Goss. [184]

Q. Which Mr. Goss? A. Mr. Worth Goss.

(Testimony of Don Hendrickson.)

Q. And when did you make such a request of Mr. Goss?

A. Well, I have made it several times, that we needed the room on the west side.

Q. Well, when was the last time you made such a request to Mr. Goss?

A. Well, I think the last time was this spring, before we moved the stuff out.

Q. When you moved the material outside?

A. Yes.

Q. Was that the last time? A. I think so.

Q. And you were granted that permission, were you not, to move that? A. We were.

Q. The Puget Sound Products Company owned the use of the property, for the storage of the machinery and equipment that was in the building when you took over; is that correct?

A. Would you state that again?

Q. The only use that the Puget Sound Products Company have had of the Houghton building is the storage of the machinery and equipment that was in the building when you took it over?

A. More or less. They have used some parts of it at [185] different intervals.

Q. They have used the laboratory, have they not?

A. Well, at certain intervals that they have been up and using the grinders and things along the line there. But just down there where their testing station is is the most of what they have used.

Q. Since you took it over they have set up their

(Testimony of Don Hendrickson.)

machinery and made some—for a few days, and ran it for a few days, some of the equipment?

A. Well, just grinders as far as I know of the machinery over there, except for their testing plant.

Q. Other than that the space they have occupied is for the storage of machinery, isn't it? The machines and equipment of Puget Sound have just sat there unused?

A. Well, there is a space down there by the boilers that they have used constantly, practically constantly on testing. And the space is used——

Q. (Interrupting): Well, that space is rented by Mr. Heller and always has been, has it not?

A. I wouldn't know. I wouldn't know. It consisted of a part of the west side of the building.

Q. There has been some use made of a boiler and some equipment in that alcove on the west side of the building, is that it? A. Yes. [186]

Q. But you don't know whether that was being used by Puget Sound Products or some other company? A. No, I don't.

Q. Do you know whether Puget Sound Products Company has had any employees working there and using the equipment? A. I don't know.

Q. You don't know? A. No.

Q. Well, you are there every day?

A. Yes, but if there were employees there I wouldn't know if they were working for Puget Sound Products.

Q. You don't know who they were working for?

A. No.

(Testimony of Don Hendrickson.)

Q. But other than the equipment and machinery in the alcove there has been very little use of the machinery in the other building?

A. It isn't all in the alcove that mass of machinery is, but there is quite a little activity of getting the stuff to there, which takes up——

Q. (Interrupting): They are working with what?

A. They are working with plastic, and there is chemicals brought in there in barrels.

Q. Chemicals and plastics?

A. That is right.

Q. Well, most of it, since you moved out there, most of [187] the machinery and equipment of the Puget Sound Products Company is actually nonusable because it has either been moved or some other piece of equipment is intermingled with it so they couldn't have used it if they wanted to?

A. That is right.

Q. What I was getting at is the occupancy by Puget Sound has been primarily for storage of the equipment? A. That is right.

Mr. Treadwell: I have no further questions.

The Referee: You may step down.

(Witness excused.)

Mr. Treadwell: By agreement, your Honor, this is a witness for the trustee that is being called out of turn because he has to leave town.

THOMAS E. STURMAN

called as a witness in behalf of the Trustee, being first duly sworn, testified as follows:

Mr. Diamond: Mr. Treadwell asked permission to put this witness on out of turn. I think the record ought to show that.

The Referee: Yes, it will so show.

Direct Examination

By Mr. Treadwell:

Q. Will you state your name, please? [188]

A. Thomas E. Sturman, S-t-u-r-m-a-n.

Q. What business are you in, Mr. Sturman?

A. The machinery business.

Q. How long have you been in the machinery business? A. On my own, since 1938.

Q. And as an employee of someone else?

A. By the Harnischfeger Company, 2911 First South.

Q. What business are they in?

A. They are builders of cranes——

Q. How long?

A. (Continuing): ——scaffolds, and motors.

Q. How long were you with them?

A. Approximately eight years.

Q. That takes us back to 1930. Were you in the machinery business prior to 1930? A. Yes.

Q. In what capacity?

A. In the oil field business, oil machinery business in California.

Q. And for how long? A. Twenty-two.

(Testimony of Thomas E. Sturman.)

Q. Well, that is 30 years now you have been in the machinery and equipment business?

A. Yes.

Q. Are you familiar with the Houghton plant of the Puget [189] Sound Products Company?

A. I have been there several times.

Q. Are you familiar with the cranes that are there? A. Yes, sir.

Q. Will you describe the two cranes located in that building?

A. Well, one crane is a 15-ton crane, 47½ foot span, fish-belly girdle crane. It is cab-controlled with a.-c. motors.

And there is another smaller crane which I think is about 37½ foot span, thereabouts. Now I—it is rated at 10-ton, but I believe it is only a 5-ton. I mean it is classed as a 10-ton but it is probably only a 5-ton. I didn't ever get up on the crane to inspect the motor, but it is a good crane.

Q. You are familiar with the machinery rental business, are you? A. That is right.

Q. What in your opinion would be a reasonable rental of the 10-ton crane as it now exists in the Houghton plant?

A. The 10-ton crane should be worth about $25 a day; if we were renting it that is what we would ask. And the 15-ton crane would be worth at least $35 a day. That would be a minimum, on the two cranes.

Q. And that would be rented by—how is [190] machinery of that type rented?

(Testimony of Thomas E. Sturman.)

A. Well, it is rented in two different ways, by the day or by the month, or by the lift. In other words, if you just have one lift you charge so much for the lift, so much a day, or by the month at so much a month per working day.

Q. How much would the 10-ton crane rent for by the month?

A. The O. P. S. price on that would be 10% of its cost.

Q. Per month? A. Per month.

Q. Do you know the approximate cost—are you familiar with the cost of those cranes?

A. Well, a 10-ton crane today of that capacity would cost about $18,000.

Q. On that figure the reasonable rent for the 10-ton crane would be $1800 a month?

A. Beg pardon?

Q. If you take 10% of the cost of the crane as a rental figure, the rent of that 10-ton crane would be $1800?

A. That would be the O. P. S. ceiling price.

Q. That would be the highest rent?

A. Yes.

Q. But a reasonable rent you feel for that crane, for the 10-ton crane, would be $25 a day?

A. That is right.

Q. And for the 15-ton crane, would be—— [191]

A. $35.00.

Mr. Treadwell: I have no further questions.

(Testimony of Thomas E. Sturman.)

Cross-Examination

By Mr. Diamond:

Q. Mr. Sturman, who do you rent cranes to?

A. Well, I have rented cranes—it is not a very—in other words, you don't rent them very often in a building. But if there is a crane in a building and a person wants to use that crane for unloading material or loading material, you occasionally have a call. Now we had a crane down here on First and Marginal Way which we bought from Nettleton Timber Company, and this was just during the War, this 15-ton crane approximately the same type of a crane in question. And it was $25 a day, we charged $25 a day.

Q. You rented it to somebody? A. Yes.

Q. Who did you rent it to?

A. To Peterman Manufacturing Company.

Q. And who owned the building that the crane was in? A. Nettleton.

Q. And you owned the crane but not the building?

A. We bought the crane from Nettleton.

Q. And you rented it in Nettleton's building.

A. In Nettleton's building. [192]

Q. What did you pay net for rent?

A. Well, we had bought the crane from Nettleton, and we had the privilege of renting the crane to Peterman until such time that we dismantled it. There was no charge from Mr. Nettleman for the building. That was understood.

(Testimony of Thomas E. Sturman.)

Q. That was part of your arrangement in the purchase of the crane?

A. That was an oral agreement that we had with Mr. Nettleman. And then I have rented——

Q. How many months did you rent that crane like that? A. Well, that was per day, one day.

Q. You rented it for one day?

A. One day.

Q. And that is all? A. That is all.

Q. $25? A. No, that was $35.

Q. $35 for one day? A. For one day.

Q. Peterman came in and used the building and the crane for one day and you got $25 or $35 for it?

A. That is right.

Q. Where did you ever see a real rental of a crane of this kind?

A. We have rented cranes from the General Construction [193] Company in Seattle.

Q. What kind of cranes?

A. Whirley crane, electric crane, whirley crane.

Q. Those are cranes that you can move around and take away from a particular piece of real property? A. That is right.

Q. Where have you ever rented a crane that was affixed to the real property, that wouldn't operate without real estate?

A. We have rented cranes at the Commercial Iron Works in Portland.

Q. Well, what kind of a crane was that?

A. That is a bridge crane.

Q. And on whose property was it located?

(Testimony of Thomas E. Sturman.)

A. In the Commercial Iron Works.

Q. And did you rent the property from them?

A. We bought the crane and rented the crane. We did not buy the property.

Q. Who did you rent the crane to?

A. To the Johns Holding Company.

Q. And how long a rental was that?

A. Oh, that was approximately two weeks.

Q. And they used a building that wasn't yours?

A. That is right.

Q. And what did they pay for the use of [194] that? A. For the building?

Q. Yes.

A. Well, they were buying equipment out of that building, and they were using the crane to load it.

Q. Now, Mr. Sturman, when you gave us a figure of 10% of the cost as the reasonable rental on equipment, that is the A. G. C. rental rates, isn't it?

A. Yes.

Q. And that is talking about movable equipment, isn't it, shovels and——

A. (Interrupting): You will find it includes bridge cranes.

Q. And cranes fixed in a building?

A. Beg pardon?

Q. And cranes fixed in a building?

A. Oh, yes. Bridge cranes would be fixed in a building.

Q. If you were going to rent a crane for any length of time which was affixed to a building you

(Testimony of Thomas E. Sturman.)

would have to rent the building, too, wouldn't you?

Mr. Treadwell: I think that is kind of immaterial. It has already been held that this crane is not affixed to the building.

A. Here is a load of merchandise comes in, maybe come on a flat car. And the flat car is switched into the building. It is being shipped to Alaska by boat. They need the [195] crane to unload the merchandise from flat car to truck. There is a crane in the building. The proposition is this: We want to rent that crane. What is your rate? $35 a day. It is a deal.

Q. Well, now, Mr. Sturman, it is the position of the trustee here that they own the crane—let's take this one crane first, the small one.

* * *

Q. (By Mr. Diamond): Mr. Sturman, assuming for the moment that someone owns a crane in a building of the type which you have described as a 10-ton crane but they don't have any right to use the building as such, they merely own the crane and have the right to remove it, and they come to you and said, "We would like to rent that crane out. not the building or any part of the building." How much rental could you tell them you could get for just the crane?

* * *

A. The price would be $35 a day for a [196] 15-ton crane, irrespective. If you had an agreement with the owner of the building and you put up a

(Testimony of Thomas E. Sturman.)

bond for any damage done to the building while you were using that crane, which we usually do.

Q. That kind of rental, you would have to make arrangements with the owner of the building so you could use that, too? A. That is true.

Q. Now——

A. (Interrupting): In other words——

Q. Yes?

A. In other words, I have a crane. There is a party wants to use that crane, it is dismantled, it is on the ground. "Mr. Sturman, we want that crane for a month or less, nothing over a month. We will take the crane and we will assemble it in our building. What will you charge me rent on that crane?" "$35 a day."

Q. And who would assemble it?

A. We would assemble it and disassemble it and deliver it back in the same condition that we found it, that we received it, and take all responsibility.

Q. Mr. Sturman, can you tell me the reasonable value of the 10-ton crane?

A. The one in Tacoma?

Q. In Houghton. [197] A. In Kirkland?

Q. Yes.

A. Well, I would rather not answer that question. I have just bought a crane similar to it, over in Boise, Idaho, last week.

Q. Well, you can use that as a guide. But what is the reasonable value of this crane?

A. For resale, if I was buying it for resale, I would gladly pay $7500 for it.

(Testimony of Thomas E. Sturman.)

Q. What is the O. P. S. price, ceiling, on it?

A. Well, that all is judged by the age and the condition and what it cost new.

Q. 55% of the new price, is that what it is?

A. If it is built within 1920, it would be about 55%.

Q. Was this crane built before?

A. I haven't the serial number and haven't checked, I wouldn't know.

Q. Can you tell me what the reasonable value of the 15-ton crane is?

A. I was under the opinion that you were asking me about the 15-ton crane. You are referring to the small crane now. I wish to change that testimony that I was speaking of the 15-ton crane.

Q. I see. Your price of $7500 was with reference to the 15-ton crane? [198]

A. That is right.

Q. And when you gave that price, is that what you thought was the reasonable market value of it?

A. That is right.

Q. Now, let's take the small crane, then. What is the reasonable value of that?

A. Well, that crane would be worth about $4500, to a dealer.

Mr. Diamond: That is all.

The Referee: Anything further?

Mr. Treadwell: No further questions.

(Witness excused.)

L. W. WILEY

called as a witness in behalf of Mortensen & Co., being first duly sworn, testified as follows:

Direct Examination

By Mr. Diamond:

Q. Mr. Wiley, will you state your full name, please?

A. Lawrence W. Wiley, W-i-l-e-y.

Q. And where do you live, Mr. Wiley?

A. At Port Blakely, Washington.

Q. Will you tell us about how long you have lived in this general area? [199]

A. For about 49 years.

Q. What is your occupation?

A. I am vice-president of John Davis & Company.

Q. And who is John Davis & Company?

A. John Davis & Company is a real estate, property management and mortgage loan, sales organization, located at 807 Second Avenue, Seattle.

Q. How long have they been in business?

A. Since 1888.

Q. And your occupation or profession is what?

A. Well, I am in charge of sales to commercial leasing, and handle a good many pieces of real estate in a property management fashion.

Q. Tell us whether or not you have any qualification for appraisals of real property.

A. I have been appraising real property since around '25, and leases.

(Testimony of L. W. Wiley.)

Q. Were you employed by the government in some capacity as a real estate appraiser?

A. Yes, I was chief appraiser of the real estate section of the United States Army Engineers during the last war in the North Pacific Division, covering Oregon, Washington, Idaho and Montana and previous I was assistant reviewing appraiser of the Federal Land Bank, Spokane.

Q. Mr. Wiley, did you go out and look at the Houghton [200] shipyard plant which is occupied now by Nelse Mortensen & Company?

A. Yes, I did.

Q. When did you go out? A. Last week.

Q. You went out at the request of my office, did you not? A. Yes.

Q. For the purpose of appraising the rental value of the property? A. Yes.

Q. Did you notice that there were two tenancies or occupancies out there? A. Yes, I did.

Q. Could you determine how much of the building was occupied by each of the two, and which ones they were?

A. I had it outlined to me. I had a map showing the present lease, and measured off the areas that are presently under that lease, yes.

Q. Well, suppose you tell us first what you found out there and the nature of the occupancy, and what space was occupied by each?

A. Well, Mortensen's operation occupied most of the east half of the building. There were spaces laid off, about 20 feet as I recall, along the west

(Testimony of L. W. Wiley.)

line, there were two doorways through there about 18 feet wide which came in from the outside which were more or less common user space. [201]

The laboratory was occupied by the other tenant, that is the tenant. The chipping house and a little house outside was occupied by the tenant—these were out near the dock, on the north side of the property, one on the north side of the property and the other on the south side of the property right at the end of the docks. Inside they had space for a sander and a press, as I remember.

(Short recess.)

Q. Were you about to finish something when we were interrupted, or do you remember?

A. Where were we?

(The last paragraph of the last answer was read by the reporter.)

A. And then there is a small boiler room area inside that they occupy. This area on the west is 21.6 feet by 175 plus 21.6 by 58 feet, more or less.

Then there is another area along there, this might be referred to as the board-making area. It is 3780 square feet plus 152.8 feet north of the doorway, there is a total area in that space of about 5,032 feet. And the doorway area, as I say, is about 18x21.6. There is a small toilet space under this new lease, the northeast corner of the building, about 8x9.3 feet, or 74.4. And then there is a laboratory on the southeast that joins the main building on the southeast corner, that has got 1934.79 square [202] feet.

(Testimony of L. W. Wiley.)

And the board press area that I mentioned before is about 889 square feet plus some access from the yard outside, and there is some outside unloading space only under that lease of about 1188 feet, which is outside of the south doorway, on the west side of the building.

Q. Mr. Wiley, did you determine what the reasonable rental and value would be for that space occupied by the tenant as you described it?

A. During what period, may I ask?

Q. During the past year.

A. Well, the space which I valued was a space that was occupied up until September of last year. As close as I could gather as to the circumstances, it is an unusual type of tenancy and fluctuating amount of space and conditions of use. It was my opinion that a fair rent, average fair rent for this period of time for the use of this tenant in the way of storage of machinery in there was about $500 a month.

Q. Mr. Wiley, are you familiar with the fact that approximately that space was leased out as of September 1 to someone else?

A. Well, there was less space leased out than was apparently used on the average of use during the period up until September.

Q. You have seen that lease?

A. Yes, I have seen the lease. [203]

Mr. Diamond: You may inquire.

(Testimony of L. W. Wiley.)

Cross-Examination

By Mr. Treadwell:

Q. That would be, of your $500 a month that you have determined as being reasonable rent, how much did you allot for the rental of the laboratories?

A. That was included in the $500 a month.

Q. Did you inquire and determine the amount of rent that was being paid for the laboratory space?

A. No, I wasn't advised of that. In other words, my figure includes the laboratory space.

Q. In other words, if rental is being paid for the laboratory space, then you would decrease your $500 estimate by the amount of rent being paid for the laboratory? A. That would be correct.

Q. Would there be any difference in your figure for rent if the property and machinery and equipment located on the property was in actual use rather than being for storage?

A. Well, that is one—that is a difficult question to answer. These unusual types of tenancies are very hard to arrive at an opinion on except to just take a look at the picture as you see it. The average owner wouldn't rent space the way that was rented and used.

If I were to rent out the whole building I would have arrived at a higher rental than I used in this, or if I were [204] to—if it were so arranged that

(Testimony of L. W. Wiley.)

I were to estimate the amount of space used on a permanent basis I would have probably arrived at a higher rental. This is more a rental of convenience as I view the situation.

Q. What would be the normal rental of a building costing $50,000 of that same size and location?

A. Well, the cost wouldn't have any particular thing to do with it. Around three to four cents a square foot per month for that space, depending on——

Q. (Interrupting): The cost of the property, depreciation allowed to the property, life expectancy of the property, wouldn't determine it?

A. That hasn't anything to do with it.

Q. The reasonable rental, at all? A. No.

Q. Well, from your observation was Mortensen utilizing all of the property that was needed in their operation? A. When I was there last week?

Q. Yes.

A. I don't know what their requirements are. They didn't seem to be using all the space they had.

Q. You set aside a special area for the sander, didn't you?

A. It was set aside under the terms of this lease. I examined the area. [205]

Q. Was Mortensen using that property?

A. I don't—the sander is at the lower end. If you would let me look at that map. I think they overlapped and touch on one piece of it. I asked about one section, I remember. Yes, there was a piece right in here. a little piece of this that he said

(Testimony of L. W. Wiley.)

they were overlapped and had to get out of the way there.

Q. When actually Mortensen had equipment of his own set up right in there?

A. Oh, this portion of it there, right in here (indicating).

Q. And the equipment he had set up actually extended up and over the top of the sander, do you remember seeing that?

A. Well, I really don't. But I asked about it because I was trying to allocate these spaces the way they were shaped, and the distances from the walls, and so forth.

Q. How much space did you allot in this sander space?

A. Now we are talking about the current lease, or the former space, before this lease.

Q. In light of the current lease? Did you get your square footages from the current lease?

A. I just measured out the square footage under the present lease, but I didn't get it in arriving at the rental that I thought was due up until September 1st.

Q. Well, where did you get your information as to the [206] amount of space occupied by Puget Sound Products Company?

A. I got it from this gentleman back here who testified previously as to what space they had used as closely as I could find out from him what that consisted of, because that wasn't what they were using at the present time.

(Testimony of L. W. Wiley.)

Q. Your figure was estimated on the amount of square footage used, based upon information you obtained from Mr. Hendrickson, is that right?

A. That is the only source I had. I didn't compute it, however, right out the way I would have on a regular lease.

Q. Did you compute the square footage on the Haller lease? A. Yes, I did.

Q. What is the total square footage?

A. I don't believe I totaled it, but I will see if I had it. No, I think I would have to total it for you.

Q. Would that be much of a task to multiply those figures there and obtain that square footage?

A. I can put them right on this map, I believe.

Q. Oh, don't write on the map. Write on your own piece of paper, but take the figures off the map.

A. I will just start with the sander. There is 327 square feet. The boiler house is 692 square feet. The outside yard loading and unloading is the north part of the building. [207]

Q. Is there any allocation here for outside?

A. It is in the lease. It is space outside of this doorway, unloading.

Q. It is that space?

A. That is 1188 square feet unloading. That is not part of the building. I will put that down here as unloading. The board-making area is this area here as outlined, is 5,032. There are some fractions here, but approximately. The laboratory is 1934.79.

(Testimony of L. W. Wiley.)

The board press is 889. I believe that is all the space covered.

The present lease is 9949 square feet plus—and the unloading area of 1188 square feet, plus. In other words, there is 9949 square feet in the building itself.

Q. Does that include the laboratory space?

A. Yes, it does.

Q. And your square footage rate that you applied to the lease was how much—not to the lease, but to the reasonable rental to be allowed?

A. If this building were rented as a permanent lease it would rent for somewhere between three and four cents a square foot. The laboratory probably would bring a higher rental because it is finished space.

Q. Well, now, on Mortensen Exhibit 1 that is before you, what in your opinion is the reasonable rental to be allowed Mortensen & Co. for the use of the space outlined on that [208] Exhibit 1?

A. In looking that over, considering the fact that the space is rented under the lease requires access to it and is split up through the space, I felt that the rental they charged was a reasonable rental, of $400.

Q. What? A. Four hundred dollars.

Q. Now, if you allotted $100 of that rent to the laboratory, then $300 would be a reasonable rental for the balance of the property?

A. The way it is laid out I would think so.

* * *

(Testimony of L. W. Wiley.)

A. The lease doesn't describe any access particularly to these areas in here. That is the confusing part of the lease.

Q. (By Mr. Treadwell): The reasonable rental figure you are giving is for the ordinary tenancy, landlord and tenant situation where you have a landlord with property who wants to rent it and a tenant who wants to occupy it?

A. Well, it has to be under the circumstances of the lease in order to arrive at an opinion of rental. [209]

Q. Were you advised of the circumstances in this particular case?

A. I was told what they were, yes.

Q. That Mr. Mortensen is the redeemer?

A. Yes, I was told that.

Q. You did not consider that in——

A. (Interrupting): Well, that had nothing to do with it, so much as the question of the use of the space.

Mr. Treadwell: I have no further questions.

Questions by the Referee:

Q. The picture as given you by Mr. Hendrickson as to the use of the space would indicate considerable egress and ingress and use of the space?

A. Yes, and as I gathered the picture from the beginning, they were pretty well scattered over and they were moved. It is pretty hard to get some definite amount each month, or as to the space actually occupied. I listened as close as I could as to what

(Testimony of L. W. Wiley.)

happened and asked as many questions as I could to try to bring it out, because I knew what the problem was that I was trying to testify to. And from that I gathered in my own mind that if I had been handling the situation I would have expected to get around $500 a month for that period, on the average. It was too difficult to to try to figure out what the space ought to be each month, because [210] they were moving this machinery out of the way according to what they told me, and ended up with what they have as I saw it, or approximately that.

Q. But your estimate of $500 a month would not be a very good guide if as a matter of fact there were not two tenancies, but three tenancies? If Mr. Heller and his employees were using part of the space, and Mortensen was using part of the space, and that the only space the trustee used was storage space, it would be difficult to delegate the value there, wouldn't it?

A. Well, I don't think it would be so difficult to split it up.

Q. I wish you would split it up for me, then.

A. I felt that I was just appraising what I was told was the space that was used.

Q. Yes, and appraising it that way isn't much of a guide if the facts are that there were three tenants instead of two, that is the point I make.

A. No, except that it would be the fair rental of the space.

Q. For the use of it by Heller and Mortensen and somebody else?

(Testimony of L. W. Wiley.)

A. Well, I didn't figure Mortensen's use.

Q. He had common use?

A. You mean areaways? [211]

Q. Oh, yes.

A. I considered that was the condition when I arrived at the rental, that he was entitled to the use of the areaways.

Q. (By Mr. Diamond): Mr. Wiley, the laboratory space that was used and sealed off as the laboratory, could you give us a separate figure as the reasonable rental value of that area?

A. Well, it is finished space. There is 1934 feet. I would think five cents or approximately $100 would be right on that. It is a different class of space from the remaining building.

Q. (By Mr. Diamond): So if we had two tenancies, one person occuping the laboratory and someone else the other space, you would separate one hundred off of the five hundred?

A. That is right.

Mr. Diamond: And get $400. That is all.

(Witness excused.) [212]

## CLIFFORD MORTENSEN

called as a witness in behalf of Nelse Mortensen & Co., being first duly sworn, testified as follows.

### Direct Examination

By Mr. Diamond:

Q. Mr. Mortensen, will you state your full name, please? A. Clifford Mortensen.

(Testimony of Clifford Mortensen.)

Q. And where do you live, Mr. Mortensen?

A. 6056 Kelden Place, Seattle.

Q. And how long have you lived in Seattle?

A. Forty-one years.

Q. You have a family, Mr. Mortensen?

A. I do.

Q. What is the family?

A. Wife and two daughters.

Q. And what is your business?

A. General contracting.

Q. What is your connection with Nelse Mortensen & Co., a corporation?

A. I am vice-president.

Q. Your father is one of the officers, too?

A. Yes. My father is the president of the company.

Q. And did you have anything to do with the acquisition of the Lake Washington property by Nelse Mortensen & Co.? A. Yes. [213]

Q. Mr. Mortensen, did you on behalf of Nelse Mortensen & Co. or on your own behalf ever make any arrangement for free rent out there at the premises?

A. I had—I never made any such arrangement on my own behalf or on behalf of the company.

Q. Do you have any knowledge with reference to any claim for free rent? A. Yes, I do.

* * *

Q. (By Mr. Diamond): Mr. Mortensen, is Bob Slater employed by Nelse Mortensen & Company?

A. He is not.

(Testimony of Clifford Mortensen.)

Q. Does he work for you personally?

A. He does not.

Q. Did he at the time that you acquired the Lake Washington Shipyard property? [214]

A. No.

Q. He hasn't at any time, has he? A. No.

Q. Mr. Slater does have an interest indirectly in the houses that were going to be fabricated out there? A. That is correct.

Q. I will ask you whether or not Mr. Slater has or had any authority at any time to make any agreements for Nelse Mortensen & Co.

A. He did not.

Q. Do you know whether or not he endeavored to make any agreements with reference to the rental of the space out at the Lake Washington Shipyard?

A. He was out there and happened to see the particular building and told me about it, and at that time Gosses had made some indication that they would, if purchase was made, they wanted to obtain free rental for a certain period.

* * *

Q. (By Mr. Diamond): Mr. Mortensen, you then requested our law office and myself particularly to inquire as to the acquisition of this property? A. Yes, we did. [215]

Q. And do you know that arrangements were made for Nelse Mortensen & Co. to acquire the interest of the Seattle Credit Men?

A. Yes, that developed later on. The first at-

(Testimony of Clifford Mortensen.)

tempt was trying to do something through Mr. Goss' advise, which we weren't able to accomplish and we dropped it for a period of some month or two months. And when it came up again I told your office to see what you could do, and you handled the arrangements from then on.

Q. Do you remember what you agreed to pay for the equity of redemption from the Seattle Credit Men's Association?

A. Originally we were advised that we had to pay $250, and we eventually paid $750.

Q. Did you ever agree that Seattle Credit Men or anyone else should have free rent as a part of that transaction? A. No, we did not.

Q. Mr. Mortensen, you did send some statements out for rent for this space? A. We did.

Q. Who did you send them to?

A. Mr. O. P. M. Goss. I think we sent a copy to the Puget Sound Products Company at Houghton.

Q. And what rent did you fix?

A. $700 a month.

Q. And can you tell us—— [216]

A. (Interrupting): Seven fifty, I believe it was.

Q. Can you tell us how you arrived at that amount?

A. Well, in fixing the rental we figured what more or less we thought would be a reasonable rental for the portion they were occupying would be, and fixed it at that figure.

Q. Mr. Mortensen, can you tell us why the state-

(Testimony of Clifford Mortensen.)

ments for rental weren't sent out prior to the date that we did send them out?

A. Yes. The title to the property wasn't cleared up for several months, and although I had talked to you about it several times you advised holding up sending out statements until we did receive the said title.

Q. Mr. Mortensen, in your use and occupancy of the premises out there, first with reference to the large crane, can you tell us about how much use you made of the large crane?

A. The large crane on the west side of the building, we had very little use out of that particular crane except for loading or unloading at times.

Q. Anyone else use that large crane besides you?

A. Yes, Mr. Heller or Puget Sound Products Company used it occasionally, too.

Q. You say you used it very little. Could you be a little more specific about it than that?

A. You could probably say that it did not have a total time, I don't think, of a week's use. [217]

Q. Was your use such that if it hadn't been there you would have had to go out and acquire one to use?

A. No, we had our own little truck crane which was available to use if we had to.

Q. What can you tell us about how much use you made of the small crane?

A. Oh, the small crane was used considerably more in fabricating paneling for housing over there. Probably a steady usage, it probably had maybe a

(Testimony of Clifford Mortensen.)

month or month and a half's use. There was only about—there was 26 houses, and 32, and 9, is all the houses that were built there, so you couldn't have a great deal with that many houses, out of one crane.

Q. Mr. Mortensen, you rent construction equipment of various kinds and deal in construction equipment? A. We do.

Q. Are you familiar with the rental of cranes of this type which are affixed to real property?

A. Actually, I am not.

Q. Have you ever known cranes of this type to be rented out?

A. No, it isn't very common practice.

Q. Has any rent been paid to you for the use of this space?

A. We have received some rental. [218]

Q. You received some rental for the laboratory, did you not?

A. For the laboratory, that is correct.

Q. At a rate of—— A. $100.

Q. $100 a month? A. Yes.

Q. And since the new lease beginning September 1st you have received rental under that?

A. $400 a month under that lease.

Q. Do you know what months' rental is actually due? September 1 is the termination point, from your testimony, but when would the rents start?

A. The rent would start about the first week of November, I believe.

(Testimony of Clifford Mortensen.)

The Referee: Had you had your title search at that time?

The Witness: No, but that is when we exercised our right of redemption.

Mr. Treadwell: Perhaps Counsel will stipulate here that this Exhibit No. 5 can be used in this proceeding.

Mr. Diamond: Yes, I will stipulate with Counsel that the exhibit——

Mr. Treadwell: Mortensen's No. 5.

Mr. Diamond: Yes, Mortensen's Exhibit No. 5 may be used in evidence as part of the record in this matter. [219] Counsel, do you have the statements that were sent out to you for rent?

Mr. Treadwell: They were sent to Mr. Goss. I'd like to offer them in evidence.

Mr. Diamond: The Mortensen Exhibit No. 5 which you have introduced shows that our redemption was effective as of November 5, 1951.

(Rent statements were marked Mortensen's Exhibit 2 of December 22 for identification.)

Mr. Diamond: I'd like to offer Mortensen's Exhibit No. 2 in evidence, which consists of four invoices not constituting necessarily all of them, but some of the invoices which were sent for rent. Any objection?

Mr. Treadwell: Well, they show on their face Puget Sound Products Company, Houghton, Washington, O. P. M. Goss.

(Testimony of Clifford Mortensen.)

I have no objection.

The Referee: It will be admitted.

(Mortensen's Exhibit No. 2, above referred to, was received in evidence.)

MORTENSEN'S EXHIBIT No. 2

Nelse Mortensen & Co.
Incorporated
General Contractors
Commercial—Industrial—Residential
1021 Westlake Avenue North
Seattle 9, Washington—Phone GA. 5555

Date: April 5, 1952.

Sold to: Puget Sound Products Company,
Houghton, Washington.

Attn.: Mr. O. P. M. Goss,
4750 - 16th N.E.,
Seattle, Washington.

Terms: Net.

Rental of premises at Houghton, Washington:

1 month—April 5, 1952, to May 5, 1952..$750.00

Rent is payable in advance.

(Testimony of Clifford Mortensen.)

Nelse Mortensen & Co.
Incorporated
General Contractors
Commercial—Industrial—Residential
1021 Westlake Avenue North
Seattle 9, Washington—Phone GA. 5555

Date: July 5, 1952.

Sold to: Puget Sound Products Company,
Houghton, Washington.

Attn.: Mr. O. P. M. Goss,
4750 - 16th N.E.,
Seattle, Washington.

Terms: Net.

Rental of premises at Houghton, Washington:

1 month—July 5, 1952–August 5, 1952....$750.00

Rent is payable in advance.

Mr. Treadwell:

This billing sent even when the Mortensen Co. is using most of the space for which they bill the company.

/s/ O. P. M. GOSS.

(Testimony of Clifford Mortensen.)

Nelse Mortensen & Co.
Incorporated
General Contractors
Commercial—Industrial—Residential
1021 Westlake Avenue North
Seattle 9, Washington—Phone GA. 5555

Date: May 5, 1952.

Sold to: Puget Sound Products Company,
Houghton, Washington.

Attn.: Mr. O. P. M. Goss,
4750 - 16th N.E.,
Seattle, Washington.

Terms: Net.

Rental of premises at Houghton, Washington:

1 month—May 5, 1952, to June 5, 1952. . . .$750.00

Rent is payable in advance.

The company does not owe these rental bills.

/s/ O. P. M. GOSS.

(Testimony of Clifford Mortensen.)

Nelse Mortensen & Co.
Incorporated
General Contractors
Commercial—Industrial—Residential
1021 Westlake Avenue North
Seattle 9, Washington—Phone GA. 5555

Date: June 5, 1952.

Sold to: Puget Sound Products Company,
Houghton, Washington.

Attn.: Mr. O. P. M. Goss,
4750 - 16th N.E.,
Seattle, Washington.

Terms: Net.

Rental of premises at Houghton, Washington:

1 month—June 5, 1952–July 5, 1952.....$750.00

Rent is payable in advance.

This bill is for space which the Mortensen Co. largely occupies.

O. P. M. G.

Received in evidence December 22, 1952.

(Testimony of Clifford Mortensen.)

Mr. Diamond: You may inquire.

Cross-Examination

By Mr. Treadwell:

Q. Is your father Nelse Mortensen? [220]

A. That is correct.

Q. Does he live here in Seattle? A. Yes.

Q. Is he in the city now? A. Yes.

Q. And Mr. Slater, is he in Alaska now?

A. No, he is back here now.

Q. He is in Seattle also? A. Yes.

Q. And what connection did Mr. Slater have with the construction of the homes? Did he have the Alaska contract or just what was his connection with the construction of the homes?

A. I can't answer that yes or no.

Q. No. You just go on now and tell me what his connection with Mortensen & Co. was.

A. Mr. Slater has an interest in an Alaska corporation called Island Homes, Inc. He is secretary of that company. And we fabricated 150 houses for that particular project up there, of which all but 26 were fabricated in the yard in back of our office during the summer of 1951. We still had a few left to do, and at that time we were interested in fabricating them under cover if we had a place, and he happened to run into this plant over there.

Q. Well, was he out looking for a plant at the suggestion [221] of you or your father or anyone connected with Nelse Mortensen & Co.?

(Testimony of Clifford Mortensen.)

A. Well, he would continually, once in a while, come back and say he had found something. He had found one in the south end of Seattle here, told us about it, and we looked at it.

Q. Who was he looking for? Himself, or for Nelse Mortensen & Company?

A. Well, he was just looking for himself, and then if he thought it was a good deal he would come and tell us about it.

Q. It was anticipated if he found something, Mortensen & Company would acquire it?

A. Yes, as I say. He told us about one prior to this one.

Q. And Nelse Mortensen & Co. were also interested in acquiring some covered area for the construction of these houses?

A. Yes, we thought it would be a good thing to have a fabricating plant.

Q. And it was understood that if Mr. Slater found such a piece of property that it would be acquired by Nelse Mortensen & Company?

A. It was no such a thing, not until we looked at it and determined that ourselves. [222]

Q. He would find it, you looked at it, and if you liked it you would buy it?

A. He told us about two of them, and this one here we liked and decided to purchase it later.

Q. What is your connection with Nelse Mortensen & Co.? What are your duties as vice-president?

A. Well, more or less general manager.

Q. Where is your office?

(Testimony of Clifford Mortensen.)

A. 1021 Westlake North, Seattle.

Q. How often are you at the Houghton plant?

A. I have probably been there about 8 or 10 times since we have had it.

Q. That is the only times you have been there, 8 or 10 times since you have owned the building?

A. That is correct.

Q. Did you ever see Mr. Goss out there?

A. Yes, you bet.

Q. Had any conversations with Mr. Goss?

A. At times, yes. Which Mr. Goss?

Q. Worth C. Goss. A. Yes.

Q. Now you went into occupancy in the Houghton plant in November of 1951?

A. That is correct.

Q. And it is now the middle of December. And in that [223] year, thirteen months, the thirteen months you have owned it approximately, you have been out there 8 or 10 times?

A. That is correct.

Q. Not any more than that?

A. Oh, it could be.

Q. Would it be substantially more or could it be less?

A. No, I think that is approximately correct.

Q. Eight or 10 is right?

A. More or less, yes.

Q. When did you first send a statement, or did you or your company send a statement to O. P. M. Goss for $750 a month rent?

A. I think we sent it to Puget Sound Wood

(Testimony of Clifford Mortensen.)

Products, care of him. About in May of this year.

Q. And did you send him a number of statements at once? Is that it? A. We did.

Q. And what was the delay?

A. We were waiting for title insurance to be cleared, through Washington Title Insurance Company. I did that at the request of Mr. Diamond.

Q. Well, when did you receive the deed, or Mortensen & Co. receive the deed to this company, do you know?

A. Oh, I don't think Mortensen Company ever received it.

Q. At whose suggestion did you send your first statements, [224] this group of statements? Let me clear that up first.

It is my understanding that no statements were sent until sometime in May.

A. That is approximately correct.

Q. And then did you send statements for how many months at that time?

A. I don't recall. I could check our records on that.

Q. But you sent out a bunch of statements, is that it, all at once?

A. Yes, sent them to Mr. Goss; yes.

Q. At whose suggestion were those statements prepared and mailed?

A. Well, I had been instigating the sending of them for several months, but Mr. Diamond said to hold up on them and wait until he said it was clear to send them.

(Testimony of Clifford Mortensen.)

Q. How was the figure of $750 determined?

A. We determined that in our office.

Q. Well, by "we," who do you mean?

A. Nelse Mortensen, myself, and Frank Hendrickson.

Q. And who are those three? Are those the three substantial owners, do they own all of Nelse Mortensen & Co.? A. That is correct, yes.

Q. And the three of you had a discussion and determined that $750 was the proper rent and to bill it for that? A. Yes. [225]

Q. Had you ever had any discussions with anyone connected with the Court or the Puget Sound Products Company prior to May relative to the amount of rent that should be charged by your company?

A. No, I think I talked to you once prior to that time, and I mentioned that we wanted to collect some rent, but I never said how much.

Q. I beg pardon?

A. Oh, I think I talked to you once, probably, prior to that time.

Q. About the rent?

A. No. We were talking about some other stuff.

Q. You think you mentioned rent, did you?

A. I believe I mentioned that we wanted some rental.

Q. Did you mention any figure?

A. No, I didn't.

Q. Do you recall having a conversation with

(Testimony of Clifford Mortensen.)

Worth C. Goss in January or February of 1952 relative to the sale of the small crane, the craneway? A. I think we talked about that.

The Referee: Well, we will review that after lunch.

(Whereupon, at 12:10 o'clock p.m., an adjournment was taken until 2:00 o'clock p.m. of the same day, January 22, 1952.) [226]

Afternoon Session

(All parties present as before.)

CLIFFORD MORTENSEN

resumed the stand for

Cross-Examination
(Continued)

By Mr. Treadwell:

Q. Do you recall having a conversation, Mr. Mortensen, with Mr. Worth Goss during the latter part of January of 1952, relative to the two bridge cranes?

A. I believe that is correct. I don't know about the exact time.

Q. Did Mr. Goss tell you he had a buyer for them, or for one of them and was going to sell it?

A. As I recall, he mentioned that to me several times, that they had buyers at different times.

Q. Did you ask him not to sell it? Did you ever ask him not to sell it?

(Testimony of Clifford Mortensen.)

A. I told them not to sell them, yes, that is correct.

Q. Did you tell them that you wanted to buy them from them?

A. I said we would like to make some arrangements with them for the cranes.

Q. Did you at any time claim to Mr. Goss that you owned the cranes?

A. I don't believe I ever told Mr. Goss that, that I [227] know of.

Q. Did you know that Mr. Goss at that time was a trustee as a debtor in possession of the bankruptcy court?

A. Well, I knew he was a trustee, but I didn't know what for, exactly.

Q. Was it your understanding that he had jurisdiction over those cranes?

A. No, it wasn't, because Mr. Howe advised me when we took the rights from the credit company that all the equipment attached to the building became part of the building.

Q. That was prior to January?

A. That was when he got the right of redemption.

Q. Did you ever assert that right?

A. No, I didn't. I let my attorneys take care of those things.

Q. But you did ask Mr. Goss not to sell the cranes, that you wanted to buy them; is that right?

A. I didn't specifically say we wanted to buy

(Testimony of Clifford Mortensen.)

them, but we wanted to work something out on them.

Q. Who is Mr. Henderson?

A. He is our partner. He is also a vice-president of our company.

Q. And where is Mr. Henderson?

A. I believe he is in Tacoma.

Mr. Treadwell: I have no further [228] questions.

Redirect Examination

By Mr. Diamond:

Q. Mr. Mortensen, do you recall receiving word through our office or myself that Mr. Treadwell was claiming the cranes?

A. Yes, I think you told me that.

Q. As part of that discussion you authorized me to make some kind of settlement if I could avoid a lawsuit? A. That is correct.

Q. Did you ever tell Mr. Goss that the cranes didn't belong to you? A. No.

Mr. Diamond: That is all.

Mr. Treadwell: I have no further questions.

The Referee: You may step down.

(Witness excused.)

ROBERT SLATER

called as a witness in behalf of Nelse Mortensen & Co., being first duly sworn, testified as follows:

Direct Examination

By Mr. Diamond:

Q. Will you state your full name, please?

A. Robert Slater. [229]

Q. (By Mr. Treadwell): Robert?

A. Yes.

Q. (By Mr. Diamond): Do you live in Seattle or in Alaska? A. Both.

Q. Mr. Slater, you are an officer of Island Homes, Inc., a corporation? A. Yes.

Q. Do you have any relationship as an officer or employee with Nelse Mortensen & Co., Inc.?

A. No.

Q. Nelse Mortensen & Co., Inc., were building some houses, prefabricating some houses for Island Homes, weren't they? A. Yes.

Q. Most of those homes were prefabricated in their own shop, or a shop by their office?

A. Yes.

Q. Sometime in the fall of 1951, I believe, they were interested in doing some of the prefabrication work under cover, were they not? A. Right.

Q. And did you on occasion submit some properties to them that they might be able to use?

A. Yes, three or four different times—pieces of property I had lined up for them.

Q. Did you ever receive a commission? [230]

(Testimony of Robert Slater.)

A. Oh, no; I just—it was for my own interest as well as theirs.

Q. What properties other than the Lake Washington Shipyard did you call their attention to?

A. Well, there was a piece over across the Duwamish, across from the old Ford plant, and a piece up on Lake Union, and a piece over in Kirkland, and then the property that they finally got.

Q. Now you called Cliff Mortensen's attention to the property at Lake Washington Shipyards?

A. Yes.

Q. Prior to the time that you had been through the property? A. Yes.

Q. Once or twice? A. Two or three times.

Q. And who did you talk with when you went through the property?

A. Mr. Goss, Worth Goss.

Q. What conversation did you have with Mr. Goss and particularly with reference to free rent? Would you just tell us what occurred?

A. Well, Mr. Goss and I talked at some length about the possibility of the company taking over the premises over there, and it was very evident that they were going to have [231] to make a move of some kind. And I told him that Mortensens were looking for such a place as that and I thought it would probably suit their needs.

And as a matter of rent, I never promised them—of course it was not my place to promise them any rent or anything like that anyway, but I do very distinctly recall telling Mr. Goss that the Mor-

(Testimony of Robert Slater.)

tensens would be very fair with them, that they wouldn't just kick them out if they did take over, wouldn't kick them out the next day. But I had no authority to say anything about the rent, that they would have to talk that over with Mortensen himself. And I would get Mr. Mortensen over there to talk to the Gosses about that.

Q. (By Mr. Treadwell): What Mortensen?

A. Cliff.

Q. (By Mr. Diamond): All the transactions in connection with the Mortensens were with Cliff Mortensen, weren't they? A. Yes.

Q. Mr. Mortensen, senior, is more or less inactive, is he not? A. Yes, that is right. [232]

* * *

Q. (By Mr. Diamond): Mr. Slater, I will ask you whether or not any negotiations were completed with Worth Goss, if you know?

A. Well, I don't know too much about the details of them, but I understand that they were not.

* * *

Mr. Diamond: You may inquire.

Cross-Examination

By Mr. Treadwell:

Q. When did you first visit the property at Houghton, of the Puget Sound Products Company?

A. The latter part of 1951.

Q. Can you place the month?

(Testimony of Robert Slater.)

A. Well, I would guess around October.

Q. And who did you talk to at the time of your first visit? A. Mr. Worth Goss.

Q. And how did that property come to your attention?

A. Through a friend of mine by the name of Ted Walker, who is a builder over in Bellevue.

Q. He told you about it? A. Yes.

Q. And what did you tell Mr. Goss as to your need of [233] the building, at the time of your first conversation?

A. Well, I couldn't tell you exactly but I know the general trend of it. They were prefabricating out in the open and it was getting winter time and it was to everybody's advantage to get under cover. So I just took it upon myself to go and try and find a place we could get into and I came across this piece over there, and I just told that same story in about as many words to Mr. Goss.

Q. Did you ask Mr. Goss the price of the property? A. Yes, I probably did.

Q. Do you recall what he said it could be obtained for? A. I think he did.

Q. What was the figure?

A. Well, it was some place around between fifty and seventy thousand, as I recall. I didn't pay too much attention to those details. I don't remember it exactly. I would have asked him that, because I was getting this information to submit to the Mortensens.

Q. Well, at any time did you discuss the ma-

(Testimony of Robert Slater.)

chinery and equipment in the building with Mr. Goss? A. No.

Q. Did you ever hear him mention it?

A. No.

Q. Did he ever advise you or tell you that the machinery went with the building or with the property? [234]

A. No, I am sure that he didn't. I wouldn't say positive, but I am quite sure he didn't.

Q. Well now, how much rent did he suggest to you, or request to you—for how long a period did they need the property rent-free?

A. As I recall, he said he would like to get it for something like six months or so.

Q. Didn't he say a year?

A. I think he put it six months to a year.

Q. And you took that word back to the Mortensens?

A. No. I told him that he would have to make his arrangements with Cliff Mortensen because I had nothing to say about that.

Q. Did you subsequently contact him and tell him that the Mortensens would not give a year's free rent but would give six months' free rent?

A. No. If that is their understanding it is a misunderstanding, because I very definitely did not say that.

Q. Did you examine any of the machinery and equipment in the building? A. No.

Q. Did you examine the cranes or determine their usability? A. No.

(Testimony of Robert Slater.)

Q. Were you interested in any of the machinery or [235] equipment in the building?

A. Just that it was there and I was more interested in the building itself. In fact, I knew the cranes were there, I was aware of it, I just assumed that they were operatable.

Q. Who did you discuss this with when you went back to the Mortensens?

A. Mr. Cliff Mortensen.

Q. Did you ever discuss it with Nelse Mortensen? A. Yes.

Q. Did you ever go out to that property with Nelse Mortensen?

A. Mr. Nelse Mortensen and Mr. Frank Henderson, both.

Q. You and Mr. Nelse Mortensen and Mr. Henderson went back out there? A. Yes.

Q. When was that?

A. It was just a few days after I first contacted Mr. Goss. I would say within a week.

Q. Nelse Mortensen, Henderson and yourself went back? At that time did you contact Mr. Goss?

A. I believe I introduced them to him. As I recall now, Mr. Cliff Mortensen asked me to take Mr. Nelse Mortensen and Mr. Frank Henderson over there during one noon hour because he was busy. I showed them the way over, is all. And I did introduce them but that was about all. [236]

Q. Did you stay there for any length of time? Did you stay there with them?

(Testimony of Robert Slater.)

A. We were there about a half hour at the very most, twenty minutes, something like that.

Q. Did Mr. Mortensen and Mr. Henderson leave with you? A. Yes.

Q. You all left together? A. Yes.

Q. Were you all together during the time you were there?

A. No, we were walking around the plant there.

Q. Who was Goss with at that time? You saw Mr. Goss? A. Yes, yes.

Q. And do you recall any conversations that you had with Mr. Goss at that time?

A. No, not in particular.

Q. Were you present during any conversations between Mr. Goss and Mr. Nelse Mortensen?

A. Well, yes, I was.

Q. Was there any discussion had at that time relative to the acquisition of the property by Nelse Mortensen & Co.?

A. I don't recall that there was.

Q. Was there any discussion relative to the machinery and equipment in the building?

A. I don't recall any detail about that, either.

Q. Did Mr. Mortensen or Mr. Henderson evidence any [237] interest in the machinery or equipment in the building?

A. I really can't say about that, either. I just don't remember.

Q. Did you ever go over there subsequent to that visit? A. Yes.

Q. And who was with you on that occasion?

(Testimony of Robert Slater.)

A. Oh, I have been there many times, either alone or with various people.

Q. Well now, in the latter part of October, would it be the first part of November or so, in that period that you took Mr. Mortensen and Mr. Henderson over there?

A. It could have been, but I wouldn't say for sure.

Q. About that time?

A. Somewheres around there, I think.

Q. When was the next time you went over there after that?

A. Well, I think it was quite a while. I was over there perhaps three or four times, either with Cliff Mortensen or Nelse Mortensen or Frank Henderson and Ted Walker. I was over there at various times.

Q. Well, were those times before the property was acquired by Mortensen or before?

A. Before.

Q. All those visits were before?

A. Yes, with those particular people, in relation to the building itself. [238]

Q. What was the purpose now of those trips?

A. Just to acquaint them with the building that I had found, and just for their interest in case they were interested in the thing.

Q. Well, they were interested in that building, were they? A. Yes, they seemed to be.

Q. In making those trips was there any interest shown by any of those men in the machinery and equipment that was in the building?

(Testimony of Robert Slater.)

A. Well, I don't know in particular if there was, but I would say there must have been.

Q. Well, do you know, do you remember any conversations?

A. Yes. Yes, I know that they talked of the machinery in there. They were cognizant of the fact that it was in a serviceable condition and could be used.

Q. Particularly what machinery?

A. Those overhead cranes in particular.

Q. Were they interested in purchasing the overhead cranes? If you don't remember——

A. Well, it was my understanding that it was part of the building.

Q. I don't want your understanding. Just what do you know from the conversations that you heard or were in on, what do you——

A. (Interrupting): They wanted the building because the [239] cranes were in there. It was all part of the over-all operation that they would have to have.

Q. Were there any discussions that you recall relative to renting the cranes? A. No.

Q. Did you participate and join in—or join in those conversations to any degree?

A. To a certain extent.

Q. What was your interest?

A. Just merely to acquaint the Mortensens with what I had found out already from Mr. Goss, and just to introduce the two parties together was all.

Q. Well, none of the conversations you recall or

(Testimony of Robert Slater.)

any statements you made or any information you obtained dealt with the machinery or equipment?

A. Just generally.

Q. Well, what do you mean "generally"?

A. Well, that the equipment was in the building there and that it was serviceable.

Q. What equipment was in the building?

A. Those overhead cranes.

Q. By "equipment," is that the only thing we are talking about, the two cranes? A. Yes.

Q. There was discussion about the cranes? [240]

A. Yes.

Q. Where did they take place?

A. Over in the building there.

Q. And who was present?

A. Well, they were mentioned when Frank Henderson and Nelse Mortensen were over there, I know in particular.

Q. The first time?

A. The first time we three went over.

Q. Did they discuss that in Mr. Goss' presence?

A. I believe they did, because I remember walking around the building out there and talking about the cranes.

Q. What was said about the cranes?

A. I think Frank Henderson was interested in the fact that they were in operating order and could be used, they were certainly usable. But any particular detail other than that, I don't recall anything.

Mr. Treadwell: I have no further questions.

(Testimony of Robert Slater.)

Mr. Diamond: That is all.

Questions by the Referee:

Q. Mr. Slater, was there a Frank Henderson or Hendrickson? A. Henderson.

Q. And he is different from Donald Hendrickson? A. Yes, sir.

Q. Now Hendrickson was the foreman, superintendent? [241] A. Yes.

Q. And Henderson was a part owner?

A. Part owner, yes.

Q. And when they moved over there and began production were you over there any considerable part of the time?

A. Not a considerable amount of time, but a fair number of times.

Q. Was this work done on any cost-plus with you?

A. Yes, it could have been considered a cost plus. The Mortensen Company did do the work for Island Homes, and billed us for it.

Q. But the amount they billed you for it depended somewhat upon what it cost them?

A. Yes.

Q. So if you could get a good, cheap place for them to operate that was to the benefit of both of you? A. Absolutely.

Q. When you first talked to them, the Gosses, about this place you had understood that they wanted to remain there for six months or a year?

A. That is what they asked.

Q. They said so? A. Yes.

(Testimony of Robert Slater.)

Q. And they did tell you the price, what it would cost to get it? [242] A. Yes.

Q. And you did report those facts to Mr.——

A. (Interrupting): Cliff Mortensen.

Q. (Continuing): ——Cliff Mortensen?

A. Yes.

Q. And then you did take these people back there, the Mortensens, to the Gosses? A. Yes.

Q. And they did have a conversation in your presence? A. Yes.

Q. Do you know of any reason why the Gosses should pay for the electricity used by the Mortensens who were operating those cranes?

A. No.

The Referee: That is all I have.

Mr. Treadwell: I have no further questions.

Mr. Diamond: Just one minute.

Redirect Examination

By Mr. Diamond:

Q. Mr. Slater, I think with reference to the contract for construction between Island Homes and Nelse Mortensen & Co., Inc., that is a lump-sum contract, is it not?

A. Yes, if it worked out on the yard over there.

Q. As far as what Nelse Mortensen & Co. received for [243] the construction, that would be a fixed price? It is not a cost plus percentage or anything else?

A. You mean on the houses themselves?

(Testimony of Robert Slater.)

Q. That is right.

A. That they prefabricated over there?

Q. That is right.

A. Well, it was fixed after the price was set in the yard, in the other yard we had.

Q. But the total price for the 150-odd houses is a lump-sum contract that they are to get? It doesn't vary with their cost of production in the shipyard plant? A. Oh, that is true, yes.

Mr. Diamond: No further questions.

(Witness excused.)

HERMAN HOWE

called as a witness in behalf of Nelse Mortensen & Co., being first duly sworn, testified as follows:

Direct Examination

By Mr. Diamond:

Q. Mr. Howe, will you state your full name?

A. Herman Howe.

Q. And you are an attorney?

A. That is correct. [244]

Q. And how long have you practiced in the state of Washington? A. About 40 years.

Q. You are associated with the firm of Lycette, Diamond & Sylvester? A. That is right.

Q. One of the attorneys in that connection for Nelse Mortensen & Co., Inc.? A. Yes, sir.

Q. On behalf of Nelse Mortensen & Co., Inc., did you acquire the shipyard property for them?

(Testimony of Herman Howe.)

A. I carried on the negotiations and completed the negotiations for the acquiring of that property.

Q. Who did they acquire the property from?

A. They acquired the property from the United States upon redemption of the property from a Marshal's sale under foreclosure of mortgage.

Q. Did you make any agreement with anyone on behalf of Nelse Mortensen & Co. whereby they would get free rent in the acquisition of this property? A. I did not.

Q. Do you know of any agreement that was made whereby as part of the acquisition cost, free rent would be given to someone?

A. No. I know of no such agreement. [245]

Q. In handling the purchase and the acquisition——

The Referee: Well, wait a minute. You heard it testified here, didn't you, at one time?

A. What?

The Referee: Didn't they testify to that at one time here?

A. Well, I say, I know of no such a thing.

The Referee: Were you present when they did testify that there was such an agreement? Maybe you were not. I don't know.

A. Well, I was present when Mr. Worth Goss testified at a prior hearing that there was some conversations, but—and I heard his testimony.

The Referee: All right. That is all I want to know. You don't interpret that as an agreement; somebody else might?

(Testimony of Herman Howe.)

A. Well, and I don't interpret it as being the truth, either.

Q. (By Mr. Diamond): What was paid to the Seattle Credit Men's Association for their right of redemption? A. $750.

Q. Did you have—did you know anything about any different amount ever having been discussed or agreed upon?

A. No, I do not. I might say that the first conversations that I had with Mr. Goss and with anybody in connection [246] with this property were conversations had with Mr. George Nickell, who was attorney for the corporation, I understand, at that time, at which Mr. Goss was present. And at that time I was inquiring as to the possibility of obtaining the certificate of redemption from Puget Sound Products Company, and obtaining title to the property. And at that time there was a statement made by Mr. Goss to the effect that they would like to have possession of the property for some time, and I told him I had no authority to make any agreement, that if any agreement was made it would have to be made with the purchaser if we purchased it. But that was in connection with a proposed purchase from the corporation.

Q. You say the corporation. You mean Puget Sound——

A. (Interrupting): Puget Sound Products Company.

Q. Did George Nickell talk to you about trying to get some free rent for Puget Sound?

(Testimony of Herman Howe.)

A. Well, he was present—no, not with reference to trying to get it. He was present when they mentioned that they would like to have it, and I told him I had no authority to make any promises, even if we did make the deal.

Q. Mr. Howe, do you know how long it was before the title, certificate of title, was obtained from the Washington Title Insurance Company?

A. Well, the actual certificate of title, as I recall it, was not obtained until about March, 1952. [247]

Q. Do you remember what held it up?

A. Mr. Schollmeyer of the title company was handling the deal and I believe he was away from the office, or ill. We were unable to get the policy issued.

Mr. Diamond: You may inquire.

Cross-Examination

By Mr. Treadwell:

Q. When did the redeemer of mortgage go into possession?

A. About the first part of November. Early in November, 1951, I believe.

Q. Do you recall when you deposited the purchase price?

A. I think it was the 5th of November. Let me see.

Q. Yes, it is.

A. The 5th of November, 1951, I believe.

(Testimony of Herman Howe.)

Q. Do you recall when you received an assignment from the Seattle Association of Credit Men?

A. I received an assignment of their certificate of redemption about the latter part of November, 1951, but I received from them prior to that time, on the 5th of November, a quit-claim deed for the property and an agreement agreeing to transfer their right of redemption.

Q. That was on the 30th of November that you received the assignment?

A. Well, it was the latter part of November. I wouldn't [248] know the exact date it was after the sale had been confirmed, I recall that.

Q. Who is George Nickell?

A. He is an attorney at law in Seattle.

Q. Who did he represent?

A. Well, I think he represented the Puget Sound Products Company or the trustee, who were at that time trying to make a compromise with the creditors of the corporation.

Q. From the inception of your negotiations you realized that Puget Sound Products Company was in reorganization? A. Yes, I did.

Q. And that the Gosses were debtors in possession?

A. Well, I didn't know about that. I knew they were trustees or something.

Q. And was the amount of the rent ever discussed with you? This $750 billing? A. No.

Q. When were those bills sent out, do you know?

(Testimony of Herman Howe.)

A. Well, I only know that from Mr. Cliff Mortensen's testimony today.

Q. When did you first go out and visit the property?

A. Oh, about—I would say about six weeks ago.

Q. Was that your first visit there?

A. Yes. Maybe not quite that long ago.

Q. Did you advise Mr. Mortensen or any of the Mortensens [249] or anyone connected with Mortensen & Co., that the cranes were part of the real estate without ever having seen it?

A. I advised them that in my opinion they would be part of the real estate.

Q. Well, when did you give that advice?

A. Before they redeemed the property.

Q. Had you seen the property at that time?

A. No, I had not.

Q. Did you know what the facts were?

A. I knew what they told me the facts were.

Q. Had you seen the blueprints of the building?

A. I had seen—not a blueprint, but a tracing.

Q. Did you make any inquiry relative to the physical location of the cranes?

A. I asked Mr.—I was told by the Mortensens, but that is all the information I had, was what I was told.

Q. What did they tell you?

A. Well, told me that the cranes were overhead cranes, that they were necessary for the operation of the plant.

Q. Necessary for what kind of an operation?

(Testimony of Herman Howe.)

A. Well, fabricating plant.

Q. Well, didn't they have a fabricating plant before they moved out there?

A. Well, I will say "convenient," then, for the operation of the fabricating plant. [250]

Q. Well, did Mortensen before they moved out there—you heard the testimony that they had an open lot that they were building these prefabricated houses in? A. Yes.

Q. Did they have any overhead cranes there?

A. I have no idea. I have never been there.

Q. Any discussion with the Mortensens about the generators?

A. Not at that time that I recall.

Q. Prior to the redemption, I am talking about.

A. That is right.

Q. Any discussion relative to any of the boilers or any of the other machinery and equipment out there?

A. Well, I believe that I told them that anything that was part of the plant was——

Q. Do you remember what you told them?

A. In my opinion, was part of the real estate, but that there might be a lawsuit in order to determine it, but that that was my opinion.

Q. What was that advice you gave, again?

A. Well, I told them that in my opinion any of the machinery that was permanently installed in the building and affixed thereto, including the cranes, was part of the real estate.

(Testimony of Herman Howe.)

Q. Well, when did you first confer—who did you tell [251] that to, by the way?

A. Oh, I think I told it to Cliff Mortensen. I don't remember.

Q. When did you first confer with Cliff Mortensen?

A. Well, I don't know. He was in the office, I think, about every week or two and I wouldn't be able to tell you, Mr. Treadwell.

Q. Well, prior to your coming into handling this redemption Mr. Diamond handled it, did he not?

A. I think so. He is the one who sent me over to see Mr.—what was the name of that lawyer?

The Referee: Nickell?

A. Nickell.

Q. (By Mr. Treadwell): Prior to that time they had decided that—in other words, prior to the time you visited Mr. Nickell?

A. Mr. Diamond sent me over to see if I could find out about what the situation was and whether we might be able to make a deal to buy from the Puget Sound Products Company.

Q. Well now, at that time had you discussed the cranes in the building?

A. No, I hadn't, I knew nothing about it. I went over without any knowledge except just what was told to me in a few minutes.

Q. Well, what had been told to you had been told to you [252] by Mr. Diamond?

A. That is right.

(Testimony of Herman Howe.)

Q. He had been handling the matter up to the time you went over to see Mr. Nickell?

A. Well, I think so, but I don't think there had been much handling of it before then.

Q. Did you discuss the cranes with Mr. Nickell?

A. No.

Q. When did you first advise the Mortensens that the cranes were part of the real estate?

A. I can't recall. It wasn't at the time we were talking about buying from the Puget Sound Products. It was at the time we were trying to work out a deal to buy the equity of redemption from the Seattle Association and redeem.

Q. All right. Now when did you start negotiating with the Seattle Association?

A. Oh, it was in the latter part of October.

Q. About the same time, right the same time you saw Mr. Nickell?

A. Oh, no, it was after we had determined that we couldn't buy the property.

Q. And then you went to the Association. And who did you talk to at the Association?

A. I talked to—if you tell me his name I will recognize it. [253]

Q. Mr. Grisvard? A. Mr. Grisvard.

Q. How many times did you talk to Mr. Grisvard?

A. Well, I think I talked to him perhaps two or three times, and I saw him perhaps a couple of times.

(Testimony of Herman Howe.)

Q. What mortgages did the Seattle Association of Credit Men have?

A. A real estate mortgage and a chattel mortgage.

Q. Had you discussed about the mortgages with Mr. Grisvard?

A. I don't think I discussed the mortgages at all particularly except that they had a right of redemption.

Q. How did you learn that the Association had a right of redemption?

A. Through a title report.

Q. Did that title report show a real estate mortgage? A. Yes.

Q. Did it also show a chattel mortgage?

A. I believe that it did, but I would have to look at the title report to be sure.

Q. But in any event you knew of the existence of the chattel mortgage when you talked to Mr. Grisvard?

A. Yes, I knew they had also a chattel mortgage.

Q. At the time the property was redeemed by the Seattle Association of Credit Men was there a hearing had in the [254] court here?

A. Yes, there was a hearing had here and there was also a hearing, I think, in the District Court with reference to certain matters in connection with it.

Q. And those hearings were for what purpose?

A. Well, the only hearing that I recall attending here was one in which the question came up as

(Testimony of Herman Howe.)

to whether the deed from the Marshal could be made direct to the Mortensens or whether—I don't recall how it came up. These bankruptcy hearings come up in certain ways without pleadings, and I have forgotten how it came up in this court.

Q. But there was a hearing in which testimony was submitted and supported, allowing the property to be redeemed by the Seattle Association of Credit Men?

A. No, I think the hearing was more—yes, that might have been, although I think the hearing more on the question of whether a deed could be made direct to Mortensens rather than to the Association, and then——

Q. (Interrupting): Was that the question submitted to the Court? Is that it?

A. Well, the records of the Court will show best. But—and I don't recall whether it was referred to this court by the District Court or not. But that is what I recall.

Q. Was a hearing had before the Referee in this courtroom? [255]

A. That is right, there was.

Q. Do you recall who brought that hearing on?

A. No, I do not, Mr. Treadwell.

Q. And the purposes of that hearing was to get the determination from the Court whether the sheriff's deed should run direct to Mortensen or to the Association?

A. I don't remember the purpose of the hearing. I was here as a spectator, and I was called as

(Testimony of Herman Howe.)

a witness. I think Mr. Nickell was making some kind of a report for the trustee. I am not certain. And I have so many of these matters that I can't recall just exactly how it came up, Mr. Treadwell.

Q. Well, you heard Mr. Nickell at the time of that hearing make a statement to the Court that part of the consideration of allowing the sale of the property to Mortensen in addition to $750 was six months' free rent. Did you hear Mr. Nickell make that statement to the Court?

A. No, I do not recall hearing him make such a statement. Well, he might have. But the only thing that I recall is that he called me as a witness and he asked me if there was any such agreement and I told him that I knew of none.

Q. You told him what?

A. That I did not know of any such agreement, that there might be, but I did not know of it if there was.

Q. At that hearing did Mr. Worth C. Goss testify?

A. I presume he did. He testifies at nearly all of [256] these hearings.

Q. Do you recall his testimony relative to the agreement to grant six months' free rent?

A. I don't recall any testimony of that kind at all. I don't think there was any such testimony.

Q. Was there any discussion had at all relative to rent? A. None that I know of.

Q. Do you know when the first billing for rent was sent to O. P. M. Goss by Mortensen?

(Testimony of Herman Howe.)

A. I told you, Mr. Treadwell, all I know about that is what I heard in court today. I knew nothing about it.

Q. Do you know how the figure of $750 was arrived at? A. No, I do not.

Q. Prior to the redemption did you know the value of those two cranes, those overhead two cranes? Have you had any experience with cranes?

A. No, I have had no experience in connection with those.

Q. Did any of the Mortensens or anyone connected with that company discuss with you the value of those cranes?

A. No, not the value of the cranes.

Q. When you rendered the advice that in your opinion they were part of the real estate did you know the value of the cranes?

A. No, I didn't.

Q. Did you make any inquiry to determine the value? [257]

A. No, I did not. I was told that they were a very important part of the plant and was asked whether or not they were part of the real estate.

Mr. Treadwell: I have no further questions.

Mr. Diamond: That is all Mr. Howe.

Oh, just one minute. I am sorry, but I neglected to introduce a couple of exhibits.

(Testimony of Herman Howe.)

Redirect Examination

By Mr. Diamond:

Q. Mr. Howe, handing you Mortensen's Exhibit No. 3 I will ask you to tell us what that is.

A. That is the original—one of the original copies—or the original copy of an agreement by the Seattle Association of Credit Men with the Nelse Mortensen & Co., dated and acknowledged on November 5th, 1951, with reference to this Houghton property.

Q. And that shows $750, recites it is the consideration, doesn't it?

A. That is correct. That is the agreement that I mentioned before was signed on that date.

Q. And handing you Mortensen's Exhibit No. 4, will you tell us what that is?

A. That is a quit claim deed from the Seattle Association of Credit Men to Nelse Mortensen & Co., Inc., for this [258] same property dated the 5th of November, 1951, and executed at the same time as the No. 3 was executed.

Q. That deed has never been recorded, has it?

A. No, it hasn't.

Q. Found it wasn't necessary in order to get good title? A. That is correct.

Mr. Diamond: I will offer Exhibits 3 and 4.

The Referee: They will be admitted.

(Original of agreement between Seattle Association of Credit Men and Nelse Mortensen &

(Testimony of Herman Howe.)

Co. was received in evidence as Mortensen's Exhibit No. 3.)

(Quit claim deed from Seattle Association of Credit Men to Nelse Mortensen & Co. was received in evidence as Mortensen's Exhibit No. 4.)

## MORTENSEN EXHIBIT No. 3

### Agreement

In consideration of the sum of $750.00, to it in hand paid, receipt whereof is hereby acknowledged, and in consideration of the payment by Nelse Mortensen & Co., Inc., to the United States Marshal for the Western District of Washington of the amount necessary to redeem the following described real estate from the sale by the said United States Marshal in Cause No. 2479 of the United States District Court for the Western District of Washington, Northern Division, made on October 21st, 1950, together with all expenses thereof, including the payment of any Real Estate Sales Tax, and all other expenses, the Seattle Association of Credit Men, a corporation, agrees to assign to said Nelse Mortensen & Co., Inc., a corporation, the certificate of redemption obtained at the time of redemption from said sale, or to convey to it by quit claim deed all right, title and interest in said real estate, which is

(Testimony of Herman Howe.)
situated in the County of King, State of Washington, and described as follows, to wit:

* * *

[Description of Real Estate.]

In Witness Whereof the said Seattle Association of Credit Men has caused this instrument to be executed by its proper officer and its corporate seal to be hereto affixed this 5th day of November, 1951.

[Seal] SEATTLE ASSOCIATION OF CREDIT MEN, INC.,

By /s/ C. P. KING,
Secretary.

[Acknowledgment attached.]

Received in evidence December 22, 1952.

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MORTENSEN EXHIBIT No. 4

Quit Claim Deed
(Corporate Form)

The Grantor Seattle Association of Credit Men, a corporation, for and in consideration of Ten Dollars ($10.00) conveys and quit claims to Nelse Mortensen & Co., Inc., a corporation the following described real estate, situated in the County of King, State of Washington:

* * *

[Description of Real Estate.]

(Testimony of Herman Howe.)

In Witness Whereof, said corporation has caused this instrument to be executed by its proper officers and its corporate seal to be hereunto affixed this 5th day of November, 1951.

[Seal] SEATTLE ASSOCIATION OF CREDIT MEN, a Corporation,

By /s/ G. C. HOLDEN,
President.

By /s/ C. P. KING,
Secretary.

[Acknowledgment attached.]

Received in evidence December 22nd, 1952.

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JOSEF DIAMOND

called as a witness in behalf of Nelse Mortensen & Co., being first duly sworn, testified as follows:

Direct Examination

* * *

By Mr. Howe:

Q. Your name is Josef Diamond and you are one of the attorneys for Mortensen & Co.?

A. That is right.

Q. With reference to the shipyard property at Houghton that is involved in this proceeding, did

(Testimony of Josef Diamond.)

you on behalf of Nelse Mortensen & Co. ever make any agreement with Puget Sound Products Company or the trustee thereof or the former trustee with reference to giving any free rent for the property?

A. I did not. I had some conversations with George Nickell about the matter of free rent, and George Nickell wanted free rent and I told him after we learned that we couldn't do business with him, that we couldn't do business with him and he had no free rent coming and we couldn't give him any because there was no consideration or justification for it. [260]

Q. Did you have any conversation with Mr. Treadwell, the trustee, with reference to that matter?

A. Well, only long after, not at the time. But long after Treadwell mentioned to me a couple of times that he thought they had free rent coming and I was insisting that we had rent coming, and they didn't have any, and I told Mr. Treadwell exactly the circumstances and all I knew about the talk about free rent.

Mr. Howe: I don't know of anything further.

The Referee: Any cross-examination?

Mr. Treadwell: I have no questions.

The Referee: Step down.

(Witness excused.)

The Referee: Call your next.

Mr. Diamond: That is all the testimony that we have at this time.

Mr. Treadwell: The trustee will call Mr. Grisvard.

E. V. GRISVARD

called as a witness in behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Treadwell:

Q. Will you state your name, please? [261]

A. E. V. Grisvard, G-r-i-s-v-a-r-d.

Q. And what is your occupation, Mr. Grisvard?

A. Superintendent of estates for the Seattle Association of Credit Men.

Q. And one of the estates that you are supervising is that of the trust mortgage of the Puget Sound Products Co.? A. Yes, that is right.

Q. Puget Sound Products Company in June of 1949 executed to the Association a real estate mortgage in trust? A. Yes.

Q. And a chattel mortgage in trust?

A. That is right.

Q. Do you recall if that real estate mortgage was foreclosed by a prior mortgagee, which was the United States of America?

A. Yes, I remember that.

Q. Do you recall the latter part of 1951 when the period of redemption was about to expire?

A. Yes, I think it was due to expire either the

(Testimony of E. V. Grisvard.)

end of October or the beginning of November, somewhere in that neighborhood.

Q. The Seattle Association of Credit Men as a second mortgagee had a right of redemption to the property at that time? A. Yes.

Q. Did you have any discussions with Mr. Howe or Mr. [262] Diamond or anyone connected with Nelse Mortensen & Co. relative to that company exercising the right of redemption of the Seattle Association of Credit Men?

A. Not with anyone of Nelse Mortensen Company. I have had some conversations both over the telephone and in person with Mr. Howe after the matter had first been brought up to our attention by Mr. Grill, of the Puget Sound Products Company.

Q. How did Mr. Grill bring it to your attention?

A. Mr. Grill called me up the latter part of October, as I recollect it, to state that there was a possibility of recovering, effecting some slight recovery for the estate, as a result of the right of redemption which the Seattle Association of Credit Men held. He explained that Nelse Mortensen & Co. were interested in acquiring that real estate and that inasmuch as we had the right of redemption they were willing to pay some nominal sum for that. I asked him if——

Q. Yes, go ahead.

A. And I asked him at the time what the sum was. He wasn't able to give any specific amount, although he said it was under negotiation. And he said, however, one of the primary considerations

(Testimony of E. V. Grisvard.)

that interested the officers of the Puget Sound Products Company was the fact that under such an arrangement they would be able to have free use of the [263] premises for the machinery in there, that is the chattels, for a period of six months. That was the statement made at the time.

I told them that under those circumstances we were interested if we could recover anything out, but if any agreement were submitted it would have to be submitted to our attorney first, Mr. L. M. Stern, for his approval.

Q. Did you say you carried on all your negotiations with Mr. Howe?

A. I had two or three—I wouldn't say negotiations, because actual negotiations as to the amounts and so on were not carried on through our office. They were carried on primarily, as I understand it, by Mr. Grill and Mr. Goss. And there was some discussion, I believe, between Mr. Howe's office and Mr. Stern as to the terms and conditions of the agreement.

Q. Did the Seattle Association of Credit Men assign their right of redemption to Nelse Mortensen & Co.?

A. Yes. It had—well no, the right of redemption was a subsequent instrument. Chronologically there were three instruments executed. The first was an agreement to convey. That had been submitted to Mr. Stern, and upon his approval had been sent to us. I believe that was introduced in evidence just a little while ago. That was brought over, if my recol-

(Testimony of E. V. Grisvard.)

lection serves me right, by Mr. Howe. And [264] I had had several conversations over the phone with him and one or two in our office, and the assignment of our right of redemption was not presented to us until the latter part of November.

For some reason or other, as my recollection goes, it was explained that the original instrument that was conveyed would probably not be satisfactory. So they prepared, I think this was prepared by the office of Mr. Howe and Mr. Diamond and submitted to Mr. Stern for approval, and then I believe Mr. Diamond brought that latter one over to our office. And on Mr. Stern's approval the officers of our corporation signed it.

There were some discussions, going back to the question as to the terms, yes, because there was some argument back and forth as to the amount.

Q. What was the consideration that the Seattle Association of Credit Men were to receive for doing what was necessary to transfer this property to Nelse Mortensen Company? A. $750 cash.

Q. What else?

A. It was our understanding that they were to receive, that is the Puget Sound Products Company or the trustee in possession was to receive rental for six months, of the premises. That was my tacit understanding all the time there. I believe that was discussed orally. But whether it [265] was discussed with Mr. Howe or Mr. Diamond I do not recollect.

(Testimony of E. V. Grisvard.)

Q. Did you discuss it with one of them?

A. I am pretty sure that this came up in our conversation, at some time during those various conversations.

Q. Well, the Seattle Association of Credit Men were interested in seeing the Puget Sound Products Company obtaining some free rent, were they not?

A. Oh, yes, we were very much interested in any concessions they could get.

Q. Well, you had a mortgage upon all the property that was stored out there; is that right?

A. Yes, that is right. On all the chattels.

Q. On all the chattel property? A. Yes.

Q. So it was to the benefit of the Association?

A. It was to the benefit of the Association and of the creditors who are beneficiaries, as well.

Q. Has Nelse Mortensen & Co. since exercising or acquiring that property ever made any demand upon the Association? A. No.

Q. For any of the property out there?

A. No, they haven't.

Q. Claimed any rights in the property listed under your chattel mortgage, adverse to your chattel mortgage? [266] A. Not to us, no.

Mr. Treadwell: I have no further questions.

Cross-Examination

By Mr. Diamond:

Q. Mr. Grisvard, do you remember this matter, as far as Nelse Mortensen & Co. first coming to your attention when I personally telephoned you?

(Testimony of E. V. Grisvard.)

A. You mean that you called me before Mr. Grill did?

Q. Oh, no, I don't know when Mr. Grill called you. But do you remember my calling you before Mr. Howe ever saw you?

A. That I do not recollect. I know that conversations came from your office, Mr. Diamond.

Q. Maybe I can refresh your recollection just a little bit. Do you remember receiving a telephone conversation from me in which I inquired about buying the equity of redemption from the Seattle Credit Men's Association and you telling me that it was so late that you didn't want to fool with it or bother with it; there had been many efforts to acquire it, and you didn't think anything could be done; and on top of that it would be Mr. Leopold Stern's baby and I would have to go see him. Do you remember that?

A. That is what I told you, any legal questions would have to be taken up with Mr. Stern.

Q. And do you recall my calling you back later, either [267] that same day or the next morning and saying, "I have talked to Mr. Stern and he has given me authority to appear—our office, to appear as attorneys for the Seattle Credit Men if it was agreeable with you so that we could serve a notice of intention to redeem in the name of the Seattle Credit Men's Association"?

A. I have some such a recollection. I don't remember the details.

Q. And do you remember our talking about the

(Testimony of E. V. Grisvard.)

consideration to the Credit Men's Association being $250?

A. That I don't remember as to what the actual consideration discussed was, no.

Q. Well, let me remind you further, maybe, that after the transaction was closed and you were paid $750, and you may recall I was away in Alaska and didn't close it, but I did come in to see you after that, after I came back, and you and Mr. Stern were present, and do you remember my chiding you and Mr. Stern about the price going up in my absence from $250 to $750? Do you recall that?

A. I remember the discussion. I don't remember how much you chided us, but I know that we were not satisfied to sell out at any $250. I remember that very distinctly.

Q. But you remember my kind of chiding you about having an agreement, or at least I thought I had an agreement?

A. Yes, I have some recollection of that, Mr. Diamond. [268]

Q. I think you were in the courtroom when I testified just a moment ago that I never heard any agreement with reference—or made any agreement with reference to any six months' free rent. Were you here? A. I heard you, yes.

Q. Did you have any conversation with me on the telephone or in person at any time in which you asked for or mentioned or I consented or in any way made an agreement for free rent for the Nelse Mortensen & Company?

(Testimony of E. V. Grisvard.)

A. My recollection, as I testified before, is that I brought that up in conversation with either one of you gentlemen but I don't remember which one.

Q. Wasn't your conversation, if at all, with Mr. Grill with reference to the matter of free rent?

A. No. That was the original conversation. When is the one that transmitted that information to me that was to be a consideration?

Q. Well, would you say that you had conversation with me about free rent?

A. One or the other of you gentlemen. Frankly, it is over a year has elapsed and I don't remember which one. I made no notes of it because there was no written agreement.

Q. Well, the agreement for me to act or for our office to act as your attorney in giving the notice, that was made with me over the telephone, after clearing it with Mr. Stern? [269] And I called him and got permission and I immediately got the notice out? A. That is right.

Q. Would you have mentioned the matter of free rent over the phone with me at that time?

A. Yes, I imagine I would have.

Q. Do you think you did?

A. I imagine I would.

Q. Do you think you did?

A. I think I did if that was the sequence of events, if you talked to me before Mr. Howe did. I don't remember which of you talked to me first.

Q. I talked to you first.

(Testimony of E. V. Grisvard.)

A. Well, I am quite sure that I talked to one or the other of you gentlemen about that, mentioned it.

Q. Now the agreement between your office and Mr. Mortensen was reduced to writing, wasn't it?

A. That is right.

Q. Was there anything in the writing about free rent? A. No, no; that is right.

Q. Any complaint about it not being in the writing? Do you remember that?

A. I don't remember, no. All those documents were approved by our attorney and we just signed after receiving his okeh on them. [270]

The Referee: Well, Mr. Diamond was the attorney for both of you?

Mr. Diamond: With Mr. Stern's approval I was given permission to get out the notice in the name of the company because he was sick at home.

The Referee: Your office also presented the order to the Court?

Mr. Diamond: On behalf of Nelse Mortensen & Company, but we were not then representing Seattle Credit Men.

The Referee: I think you were.

Mr. Diamond: Well, we weren't representing both sides at the same time.

The Referee: I think you were.

Q. (By Mr. Diamond): In our dealing with your office, your attorney, Mr. Leopold Stern, represented your side at all times?

A. That is right.

(Testimony of E. V. Grisvard.)

Q. I wasn't representing you and myself at any one time, was I, in any dealings with you?

A. I remember your drawing up that particular petition or agreement, whatever it was there, through some understanding between yourself and Mr. Stern.

Q. That is right. And Mr. Stern went over this and approved it before you ever signed it?

A. I believe he did, yes; that is right. That is the [271] only condition under which we would sign it.

Mr. Diamond: That is all.

Mr. Treadwell: I have no further questions.

(Witness excused.)

(Short recess.)

The Referee: Call your next.

Mr. Treadwell: I will call Mr. Goss, Worth C. Goss.

## WORTH C. GOSS

recalled as a witness in behalf of the Trustee, being duly sworn, testified as follows:

### Direct Examination

By Mr. Treadwell:

Q. Will you state your name, please?

A. Worth C. Goss.

Q. And what is your connection with Puget Sound Products Company?

A. I am vice-president of the company, and I

(Testimony of Worth C. Goss.)

represented the debtor in possession during the year—part of the year 1951.

Q. At the time that your company did file a voluntary petition for reorganization under Chapter 10? A. That is correct.

Q. And the Judge entered an order keeping the—placing [272] the debtor, that is the existing officers of the corporation, in possession of the property? A. That is right.

Q. To manage it under the supervision of the Court? A. Yes.

Q. Calling your attention to the latter part of the year of 1951, do you recall meeting a Robert Slater? A. I do.

Q. And where did you meet him?

A. At the plant, in the laboratory.

Q. And that is the plant at Houghton?

A. That is right.

Q. The plant of the Puget Sound Products Company? A. Yes.

Q. Do you recall what month that was in 1951?

A. I believe it was in October.

Q. And what was the purpose of his visiting you there?

A. The discussion was concerned with the possibility of either leasing—of the Mortensen Company either leasing space in the plant, or the Puget Sound Products Company leasing space from the Mortensen Company.

Q. Did he state who he was representing or why?

(Testimony of Worth C. Goss.)

A. Yes, he stated he represented the Mortensen Company.

Q. Do you remember exactly what he said as to that?

A. Well, he said they wanted to find a place to build [273] panel houses, that they were willing to lease but preferably they would like to buy?

Q. Did you show him through the plant?

A. Not the first meeting.

Q. What did you tell him as to the availability of that plant?

A. Well, I had been discussing the possibility of Mr. Heller redeeming the property, and if that was the case I wanted to present the facts to Mr. Heller because if he could lease part of the plant immediately it would have made the deal more attractive to him. Mr. Heller was already paying all expenses in the plant. And on the other hand, if the Mortensen Company would redeem and not disturb our equipment, why that would be perfectly attractive to us, too.

* * *

Q. (By Mr. Diamond): Did you show Mr. Slater through the plant?

A. Not the first night. I did on a subsequent visit.

Q. How soon after his first visit did he return?

A. Oh, it was quite shortly, a matter of two or three days. [274]

Q. Did he return alone? A. Yes.

Q. At that time did he look over the plant?

(Testimony of Worth C. Goss.)

A. Yes.

Q. Do you recall any of the discussions that took place on that occasion?

A. He said that he discussed it with his principals and they were much more anxious to buy than to lease, that with the business expectations they had it would be very much better business for them to purchase.

Q. Did you at that time make any statement to Mr. Slater relative to occupying the premises?

A. Yes, I explained that we would be perfectly willing to cooperate and lease or rent from Mortensen if they wished to purchase, that we would aid them in any way possible.

Q. Was any rental determination discussed?

A. I explained that we would, in return for our assistance, but primarly for the use of our equipment, that we would have to have a reciprocal arrangement whereby if they used our equipment, which was probably more valuable than the property, we would have to have, why it would be an even trade for a period of twelve months.

Q. And what equipment were you referring to?

A. Well, Mr. Slater had only superficially examined the equipment, but he had noticed the cranes particularly and [275] thought those would be helpful in the building of panel houses.

Q. Did Mr. Slater make any inquiry of you whether they went with the real estate or belonged to Puget Sound?

A. I explained carefully that they did not, that

(Testimony of Worth C. Goss.)

we had complete title to all the equipment in the building.

Q. Thereafter did you have another conversation with Mr. Slater?

A. Mr. Slater visited his principals again. He told me that he talked to Mr. Nelse Mortensen and that Mr. Mortensen said that they wouldn't be willing to make such an arrangement for a year. Six months was as long as they would consider it.

Q. Was that on Mr. Slater's third visit?

A. It was just shortly before he met Mr.—brought Mr. Nelse Mortensen and Mr. Henderson over to the plant. I said—I discussed it with the other officers of the company and we agreed that if that was the best they would be willing to do, why we would be willing to proceed and leave our equipment in the plant. We were faced with the need for moving our equipment unless we either accepted that offer or rejected it.

Q. At that time had Puget Sound Products Company made any arrangements for the moving of the equipment?

A. I had found that there was space next door in the [276] Alaska Terminal & Stevedoring Company warehouse to store the equipment, if necessary.

Q. Had you made any check as to the cost of moving the equipment at that time?

A. Well, I had made my own estimate, and the superintendent of the shipyard next door said he would loan us his power buggies, tractors, to help

(Testimony of Worth C. Goss.)

us move and so on. And we had already rented some space in the warehouse there, so that if necessary we could have moved.

Q. What was your estimated cost of just moving the property next door for storage?

A. My estimate was a minimum of $1500, and possibly something over $2000 to move. And the company did have the money on hand to make the expenditure if it had been essential.

Q. Do you recall whether Mr. Slater returned with the six-months proposition, was that by phone or did he return to the plant personally?

A. Well, that was directly. He said he had put it up to Mr. Nelse Mortensen and so he said, "Now if that is all right I will tell him to come over," which he did. He came over with them. And Mr. Nelse Mortensen and Mr. Henderson went over every piece of equipment with me and over every portion of the property while Mr. Slater stayed in the laboratory. Mr. Nelse Mortensen insisted on inspecting everything personally. He even opened the door of the transformer room [277] and wanted to know the exact title of all the equipment there.

Q. What was said at that time about the cranes?

A. I assured Mr. Nelse Mortensen that in return for—we would let them use the cranes in return for us not paying any rental for the first six months, and that after six months we would be willing to pay $500 a month for enough of the space to operate in. And he said, "Well, maybe at the end of six

(Testimony of Worth C. Goss.)

months we would want all of the other portion of the building. Would you be willing to move outside?" And I said, "Yes, that could be done if you would erect a shed along the side of the building." And he said, "Well, we can do that."

Q. That was Mr. Nelse Mortensen and Mr. Henderson?

A. Mr. Nelse Mortensen and Mr. Henderson. And at that time they had not yet made up their minds to purchase the property. They were making the decision at that time, and it was my presentation of the fact to them that they would be getting an excellent bargain in purchasing the property because we would let them have the free use of all that valuable equipment, something like $80,000 worth of equipment.

Q. Was there any discussion had at that time about the transformers?

A. Mr. Nelse Mortensen personally inspected them and asked who owned them. He even determined which ones were owned by the Puget Sound Power & Light Company. He was very [278] thorough.

Q. And was it your understanding that they were to have the use of the necessary transformers as part of the consideration of free rent?

A. I explained that they were to have the full use of anything we had which we didn't have immediate use for, and that furthermore, we were paying the power bill and would continue to pay the power bill and the water bill, which he thought was won-

(Testimony of Worth C. Goss.)

derful. And that was the thing which apparently induced him to purchase the property.

Q. How much is the power bill?

A. $200 a month.

Q. And who has been paying it?

A. Either the Goss Engineering Company or Mr. Heller.

Q. And that has been that way since bankruptcy; is that right? A. That is correct.

Q. And who uses most of the power?

A. Well, the Mortensen Company now.

Q. And you are still paying the power bill?

A. We are paying the power bill.

Q. And the payment of the power bill was discussed as part of the consideration for six months' free rent?

A. It was mentioned. I used it as an inducement, but the principle thing I pointed out was that this equipment [279] was extremely valuable. However, before deciding to go ahead Mr. Mortensen insisted that I give him the assurance that the cranes, that he could buy the cranes at as low a price as anybody else would pay. And I assured him that we would do that.

Q. Is that Mr. Nelse Mortensen?

A. Mr. Nelse Mortensen. At that time I had no dealings with the younger Mortensen.

Q. Then it is your testimony that the understanding at that meeting was that in the event the cranes were sold he was to—the Mortensen Company were to be considered as buyers?

(Testimony of Worth C. Goss.)

A. He had the right of refusal, first right to purchase.

Q. And in the latter part of January of 1952, did you have a buyer for the small crane?

A. We had several offers to purchase, several times. We had one offer to purchase both cranes for $16,000 cash, and we had another offer, I believe it was for some $1800 cash to purchase the small crane, which I told Mr. Cliff Mortensen about.

Q. When was that that you told him about that?

A. I believe it was in January of 1952.

Q. What did Mr. Cliff Mortensen say to that?

A. Well, he said, oh, he said, "You don't want to do that." He said, "That would spoil this whole situation here. [280] It might even ruin any future business dealings we would have." He said, "By all means don't do that."

So I said, "Well, we certainly won't." Mr. Joe Diamond was present at the time, but might possibly have been out of earshot.

Q. That was over at the plant?

A. That was at the plant. Mr. Diamond was supposedly inspecting the possibilities of manufacturing sheet lumber. That was the ostensible reason for his visit.

Q. What other equipment did Nelse Mortensen & Co. use over there other than the two cranes and the transformer system?

A. They have been using the Puget Sound Products Company's large compressor, Worthington

(Testimony of Worth C. Goss.)

compressor, to do their painting with. It is about a hundred times bigger than they actually need, but they just snap it on whenever they want to use paint spray guns.

Q. Any other equipment that you know of that they have been using?

A. Some jib cranes, two jib cranes they cut in two and welded together for some outside installation.

Q. And they then erected the jib cranes outside?

A. Erected a longer jib crane. They made one long one out of two short ones.

Q. A jib crane is just a wall bracket that flips out [281] from the wall?

A. Yes. They have it set up on a post outdoors now.

Q. Stationary? A. It is stationary.

Q. Actually all it is is a piece of iron with a block and tackle or a couple of rollers on it?

A. That is correct.

Q. Has anyone connected with Nelse Mortensen & Company ever to your knowledge made claim of title to you—to you, that is—claimed title to the cranes or the transformer system?

A. Well, on several occasions Mr. Nelse Mortensen asked if we were ready to sell the cranes. And he has never claimed them. But just recently there has been a court action. But that was the slightest intimation that such a thing was contemplated. I was shocked.

Q. Did you, at the time Nelse Mortensen was

(Testimony of Worth C. Goss.)

there with Mr. Henderson, did you also discuss the pump on the auxiliary fire system on the dock?

A. Yes, I made a big point of that with Mr. Nelse Mortensen, and Mr. Henderson was particularly interested in that. I explained that would save insurance if we let them use that, would save fire insurance costs.

Mr. Treadwell: I have no further questions.

The Referee: You may inquire. [282]

Cross-Examination

By Mr. Diamond:

Q. Mr. Goss, you say that you are paying the power bill? A. That is correct.

Q. Who is "we"? Who is paying the power bill?

A. Well, it is a group, a business group, including several people. The money come from a director of the Wells-Fargo Bank in San Francisco.

Q. It isn't the trustee in bankruptcy that is paying the power bill? A. No.

The Referee: I can assure you that. And that will be true next week, also.

Q. (By Mr. Diamond): Did you say that your paying the power bill was part of the consideration for getting free rent?

A. It was certainly a very powerful inducement. Mr. Mortensen had a sparkle in his eyes when he heard that one.

Q. Didn't Mr. Heller pay rent for the use of the laboratory?

(Testimony of Worth C. Goss.)

A. Mr. Heller was then paying rent, and also for a portion of the main plant.

Q. And wasn't Mr. Heller also furnishing the electricity free?

A. That was what I explained to Mr. Mortensen. [283]

Q. Isn't Mr. Heller still furnishing the electricity free under his lease agreement?

A. Surely.

Q. Hasn't that always been the arrangement, and you had nothing to do with it except through Mr. Heller?

A. Well, I was the one that induced Mr. Heller to make the arrangement.

Q. That arrangement was made when he was paying rent to the United States Government?

A. I didn't upset it, though. In fact, I arranged for it to continue when Mr. Mortensen came in. In fact, Mr. Heller's attorneys objected to that.

Q. I see. When Mr. Mortensen came in did you arrange the lease between Mr. Mortensen and Mr. Heller for the hundred dollars?

A. It was at my advice.

Q. Did you have anything to do with it?

A. Well, of course. I represent Mr. Heller.

Q. Well, Mr. Goss, that was negotiated in my office and Warren Slemmons was in my office and we questioned all the terms and haggled over them, and straightened them out and signed it in my office. What did you have to do with that?

(Testimony of Worth C. Goss.)

A. Mr. Slemmens happens to be representing me as well as Mr. Heller.

Q. That electricity has always been furnished free as [284] part of the consideration for the lease of the laboratory. Isn't that right?

A. At my advice, and talking to Mr. Mortensen.

Q. With reference to the electricity, Mr. Goss, there is a fixed amount that you have to pay regardless of how much electricity you use, isn't there?

A. That is correct.

Q. And that is $200, isn't it?

A. That is correct.

Q. And you have never run over $200, have you?

A. We have.

Q. Well, how often?

A. I believe one month since Mortensens have been there.

Q. And how much over did you get?

A. I don't recall the exact amount.

Q. The fact of the matter is that the furnishing of the electricity free to the Mortensens never cost the Hellers anything to amount to anything?

A. Very little.

Q. Now you or the Hellers never sold this property to the Mortensens, did you? No deal was consummated with you or the Hellers for the purchase of this property?

A. Had nothing to do with it.

Q. These conversations you are talking about, about free rent and so on, all occurred prior to

(Testimony of Worth C. Goss.)

the time that Nelse [285] Mortensen and Company bought this property?

A. The conversations induced me to leave the equipment there.

Q. Yes, but the conversations that you are talking about, about free rent, all occurred prior to the time that Nelse Mortensen & Company bought this property?

A. Well, of course. The equipment would have been gone otherwise.

Q. Now, Mr. Goss, you say the equipment would have been gone otherwise. You haven't taken any equipment out of there without getting our permission, have you?

A. Nelse Mortensen & Company.

Q. Just answer my question, please. You haven't taken any equipment without getting permission?

A. Of course we have.

Q. Anything that is fastened into the building?

A. Certainly.

Q. Boilers?

A. We have taken many things out.

Mr. Diamond: That is all.

Mr. Treadwell: I have no further questions.

The Referee: You may step down.

(Witness excused.) [286]

Mr. Treadwell: The Trustee has nothing further, your Honor.

The Referee: Will you recall Mr. Mortensen, please? Are you finished?

Mr. Diamond: Yes.

The Referee: Mr. Mortensen.

CLIFFORD MORTENSEN

recalled as a witness at the request of the Referee, being previously sworn, testified as follows:

Questions by the Referee:

Q. You took possession there, according to this order of redemption, about November the 5th. Is that right? A. That is correct.

Q. And then you went in there and cleaned up and started production? A. That is correct.

Q. But when did you get into production, do you know?

A. I believe it was about the first of December, the first week in December, something like that.

Q. And you continued producing there until when?

A. Well, when—we had about steady operation there between December to probably February.

Q. And about then what occurred? [287]

A. Well, they have had very little work in there since that time. We have had—well, let's see. The first thing we had, we made 26 houses which were shipped up to Alaska. That was one of the first things we did. And then we did an Auburn housing job which we fabricated there, which the contract for the Auburn housing lasted, oh, until about I would say about May. So we had intermittent construction during most all of that time in there.

Q. Have you had anything since May?

(Testimony of Clifford Mortensen.)

A. Since that time we have had about 9 individual houses that we built for a Mr. Ted Walker, and 2 duplex cabins that we shipped up to Anchorage.

Q. Are you presently producing there anything at all?

A. Very little. We intend starting pretty quick on a pretty good-sized project for Anchorage.

Q. And in each one of these operations where occasion requires it, you used these cranes?

A. Yes sir.

Q. And you have had the free use of them?

A. Yes.

Q. The unrestricted use? A. Yes.

Q. You didn't get permission each time you used them?

A. Oh, no, we didn't figure we had to.

Q. But you did have the free use of them, you have it now? [288] A. Yes.

The Referee: That is all of my questions.

By Mr. Diamond:

Q. Mr. Mortensen, actually you say these cranes, you have never used the big crane?

A. Very seldom. For loading or unloading only. It has just been the one crane on the east side of the building that has been used fairly steadily.

Mr. Diamond: That is all.

(Witness excused.)

The Referee: I will hear your arguments.

(Argument by Mr. Diamond.)

(Argument by Mr. Treadwell.)

The Referee: I think I should make this finding: That the Trustee has had no employees in there doing any work for him. I keep that record. And I will speak that into the record, that you haven't had any employees there producing anything.

Mr. Treadwell: No.

The Referee: All right.

Mr. Treadwell: His place has only been, as the testimony showed, storage for the property of the estate. [289]

The Referee: I will go along with that statement, I will say for storage. But we have no employees there.

(Argument by Mr. Treadwell, continued.)

The Referee: The Court has heretofore rendered its opinion on the issue as to the ownership of much of the equipment in these premises, all that is involved in this particular proceeding, that is the proceeding to quiet title to the personal property or any proceeding for the rent or storage of the property. Where are the exhibits here?

(The exhibits introduced in past hearings were handed to the Referee.)

The Court finds and conclude and decides that there was an agreement between the debtor in possession, made through Mr. Worth Goss, and the purchaser, made through Mr. Nelse Mortensen, that

the property of the Puget Sound Products Company, being the personal property referred to, could be left in the plant with the joint use by Mortensens and the Puget Sound Products Company, which in fact itself was not actually using it, but was permitted it to be used by Mr. Heller and his associates, and that that arrangement was not an unactual one, but rather an actual one for the parties at that time and until the first six months.

That is substantiated by the fact that Mortensen is a [290] business man, he wouldn't have let that go by any catch-as-catch-can, there was no reason why he should. He was moving out there, and so that arrangement was made. He didn't deny it. He has had plenty of opportunity to deny it but he hasn't appeared here.

Mr. Diamond: Who is that that hasn't appeared here?

The Referee: Mortensen, senior, the man who made the arrangement.

It is also corroborated by the fact that the sending of this bill, there seems to be some irregularity about that. They never asked the man what the reasonable rent was, just sent him a bill for six months' rent. It is not convincing to me that they had that rent coming.

Now if they made that agreement and they haven't canceled it, they have been doing it since June the same as they did before June, so I don't see why I should change it. They made the agreement, they performed it, it has been satisfactory to Heller, sat-

isfactory to the trustee, apparently so, and Mr. Mortensen hasn't tried to terminate it in any way except by claiming the ownership of all the property, which the Court found against him on that claim.

I do see by this exhibit Mr. Diamond, that it bears this notation. This is the letter in January of 1952, by Judge Lindberg, the order, presented by Lycette, Diamond & Sylvester, by Herman Howe, attorneys for the attorneys of the [291] Seattle Association of Credit Men. So apparently you were acting for both parties.

Mr. Diamond: Not between them. Not in dealings between them. Nothing irregular about that.

The Referee: Well, that is the interpretation I make. You represented them in the purchase of this equity of redemption, and the record stands on that being presented.

But the preponderance of the evidence convinces me that the agreement was made.

Mr. Diamond: Are you finding that there is a six-months' free rent agreement made?

The Referee: I am finding that there was an agreement for six months' free rent, if you can call it free rent. Of course getting the use of the power, and the joint use there may be question as to whether it is free rent or not, or whether they used these cranes. I don't find the cranes were worth $35 a day, either. I don't find the parties ever agreed upon any particular amount that they should use them or any particular amount that they are worth

a day. But Mortensen was using these cranes whenever he wanted to. Mr. Cliff Mortensen testified to that, and there was no evidence to the contrary. He didn't know how much he was using them. He didn't get permission all the time. But the agreement was he didn't have to, not because they owned them, but because we told them. But he is not using them so much now, so Mr. [292] Mortensen says. And I don't know whether we should move out now or not. That depends upon when this order becomes final.

But when these arrangements become final this Court is not going to do business on catch-as-catch-can. We are going to move it out of there unless we can make some arrangement that is satisfactory. And I think we have an arrangement now with Mr. Heller that is satisfactory, as far as I know.

And if Mr. Mortensen wants to exercise the right which Mr. Worth Goss granted, which he may or may not have had a right to grant, of buying these cranes, I am giving him notice now he had better make up his refusal because we are going to sell them. If he wants to buy them, let him buy [293] them.

* * *

(Whereupon, at 4:30 o'clock p.m., the hearing was adjourned.) [295]

State of Washington,
County of King—ss.

I Hereby Certify that I am a duly-qualified and acting reporter of Seattle, Washington;

That the foregoing is a true and correct transcript of the proceedings in the above-entitled matter.

I further certify that the following exhibits were identified and received in evidence during the course of the hearings, to wit: Mortensen & Co.'s Exhibits Nos. 1, 2, 3, 4, 5, 6, 11, 12, 13, 14 15, 16 and 17, and Nos. 1, 2, 3, and 4 of December 22nd, 1953; and Trustee's Exhibits 7, 8, 9, 10, 18, 19 and 20, and that the same are all the exhibits introduced during the trial.

Dated at Seattle, Washington, this 14th day of January, 1953.

/s/ HELEN K. WILKINSON,
Court Reporter.

[Endorsed]: Filed January 16th, 1953.

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK, UNITED STATES DISTRICT COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule II as Amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith all of the original pleadings together with Exhibits described below, on file and of record in said cause in my office at Seattle, and that said pleadings constitute the record on appeal from the Order on Review of "Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc." and Order on Review of "Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent," both dated April 6. 1953, to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Debtor's Petition for Relief under Chapter X of the Bankruptcy Act, filed February 2nd, 1951.

2. Order Approving Debtor's Petition under Chapter X of the Bankruptcy Act, filed February 3rd, 1951.

3. Order Appointing Kenneth S. Treadwell Trustee, filed January 21st, 1952.

4. Bond of Kenneth S. Treadwell, Trustee in Bankruptcy for $1,000.00, Fidelity & Deposit Company of Maryland, Surety, filed February 21st, 1952.

5. Order Increasing bond of Kenneth S. Treadwell, Trustee to $10,000.00 filed March 13th, 1952.

6. Additional Bond of Kenneth S. Treadwell, Trusee, for $9,000.00, Fidelity & Deposit Company of Maryland. Surety, filed March 20th, 1952.

7. Petition of Kenneth S. Treadwell, Trustee, filed in the office of the Referee on October 3rd, 1952 and transmitted to the Clerk's Office with Referee's Certificate on Review—re Mortensen's Claim of Ownership on February 9th, 1953.

8. Order Directing Nelse Mortensen & Co., Inc., to Show Cause, filed in the Referee's Office October 3rd, 1952, and transmitted to the Clerk's Office February 9th, 1953.

9. Answer of Nelse Mortensen & Co., Inc., to Order to Show Cause filed in the Referee's Office October 31st, 1952, and transmitted to the Clerk's Office February 9th, 1953.

10. Reply of Claimant, Seattle Association of Credit Men to Answer of Nelse Mortensen & Co.. Inc., filed in the Referee's Office November 17th, 1952, and transmitted to the Clerk's Office February 9th, 1953.

11. Memorandum Decision of Referee-Special

Master dated November 19th, 1952, and transmitted to the Clerk's Office February 9th, 1953.

12. Findings of Fact & Conclusions of Law Upon Hearing of Show Cause Order Directed to Nelse Mortensen & Co., Inc., filed in the Referee's Office January 12th, 1953, and transmitted to the Clerk's Office February 9th, 1953.

13. Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc., filed in the Referee's Office January 12th, 1953, and transmitted to the Clerk's Office February 9th, 1953.

14. Findings of Fact and Conclusions of Law on Nelse Mortensen & Co., Inc. Application for Rent filed January 12th, 1953, in the Referee's Office and transmitted to the Clerk's Office, February 9th, 1953.

15. Order on Application of Nelse Mortensen & Co., Inc., for Allowance of Reasonable Rent filed January 12th, 1953, in the Referee's Office and transmitted to the Clerk's Office, February 9th, 1953.

16. Petition to Review Orders of Referee filed on behalf of Nelse Mortensen & Co., Inc., in the Referee's Office January 16th, 1953, and transmitted to the Clerk's Office February 9th, 1953.

17. Referee's Certificate on Review—Re Mortensen's Claim of Ownership signed and filed February 9th, 1953.

18. Referee's Certificate on Review—Re Mortensen's Claim for Storage or Rent signed and filed February 9th, 1953.

19. Order on Review of "Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc.," signed and filed April 6th, 1953.

20. Order on Review of "Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent" signed and filed April 6th, 1953.

21. Notice of Appeal to Circuit Court of Appeals filed May 1st, 1953.

22. Cost Bond on Appeal to Circuit Court of Appeals filed May 1st, 1953.

23. Designation of Contents of Record on Appeal under Rule 75 of the Federal Rules of Civil Procedure, filed May 1st, 1953.

24. Stipulation for Additional Designation of Contents of Record on Appeal under Rule 75 (o) of the Federal Rules of Civil Procedure, filed May 1st, 1953.

25. Statement of Points on Which Appellant, Nelse Mortensen & Co., Inc., Intends to Rely on Appeal, filed May 2nd, 1953.

26. Inventory filed by Trustee with Referee-Special Master March 31st, 1952, and transmitted to the Clerk's Office May 27th, 1953.

27. Oath of Appraiser and Appraisement filed with the Referee-Special Master June 24th, 1952 and transmitted to the Clerk's Office May 27th, 1953.

28. Order Directing Exhibits to be Sent to Cir-

cuit Court of Appeals, signed and filed May 29th, 1953.

I further certify that I am transmitting the following exhibits: Nos. 1 to 20 inclusive, introduced at the hearing before the Referee-Special Master on November 17th, 1952, and Nos. 1 to 4 inclusive, introduced at the hearing before the Referee-Special Master on December 22nd, 1952.

I certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of appellant, to-wit:

Notice of Appeal $5.00 and that this amount has been paid to me by the attorney for the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 3rd day of June, 1953.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13862. United States Court of Appeals for the Ninth Circuit. Nelse Mortensen & Co., Inc., Appellant, vs. Kenneth S. Treadwell, Trustee of Puget Sound Products Co., a corporation, debtor and Seattle Association of Credit Men, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 8th, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13862

In the Matter of:

PUGET SOUND PRODUCTS CO., a Corporation;
NELSE MORTENSEN CO., INC., a Corporation,

Appellant,

vs.

KENNETH S. TREADWELL, Trustee, and SEATTLE ASSOCIATION OF CREDIT MEN, INC.,

Appellees.

## STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The following is a statement of the points on which the appellant, Nelse Mortensen & Co., Inc., intends to rely on appeal herein:

1. The District Court erred in entering the "Order on Review of 'Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc.,' " on April 6th, 1953, wherein the petition for review of order entered January 12th, 1953, by the Referee-Special Master, adjudging that all of the property described in the Trustee's inventory is free from any

claim, right, title or interest of Nelse Mortensen & Co., Inc., was dismissed, and the said order of the Referee-Special Master was affirmed.

2. The District Court erred in failing to reverse the said order of the Referee-Special Master, and to adjudge that the following described property constitutes fixtures, and is a part of the real estate belonging to the appellant, Nelse Mortensen & Co., Inc., to-wit:

a. A 10-ton bridge crane and a 15-ton bridge crane.

b. Electrical lighting and power system, including transformers, wiring and equipment.

c. Heating system.

d. Auxiliary fire pump used for and connected with fire protection system on docks.

e. Boiler located on the east side of appellant's building, together with pipes and equipment.

f. Compressor used for and connected with overhead fire protection system.

g. Trumbull electric switchboard.

3. The District Court erred in entering the "Order on Review of 'Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent,' " on April 6, 1953, wherein the petition for review of order entered by the Referee-Special Master on January 12, 1953, denying and disallowing application of Nelse Mortensen & Co., Inc., for reasonable

rent, was dismissed, and the said order of the Referee-Special Master was affirmed.

4. The District Court erred in failing to reverse the said order of the Referee-Special Master, and to allow to the appellant, Nelse Mortensen & Co., Inc., reasonable rent for the property used and occupied by the Trustee herein, for the period from November 5, 1951, to September 1, 1952, at the rate of $400.00 per month, or a total of $4,000.00.

LYCETTE, DIAMOND &
SYLVESTER;

By:.....,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 2, 1953.

No. 13862

# United States Court of Appeals
## For the Ninth Circuit

NELSE MORTENSEN & CO., INC., *Appellant,*

— VS. —

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT



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THE ARGUS PRESS, SEATTLE

No. 13862

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THE ARGUS PRESS, SEATTLE

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# United States Court of Appeals
## For the Ninth Circuit

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| NELSE MORTENSON & CO., INC., *Appellant*, vs. KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.* | No. 13862 |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT

### JURISDICTION

The jurisdiction of the United States District Court for the Western District of Washington, Northern Division, in this matter, was acquired by the filing of a "Petition for Relief" under the provisions of Chapter X of the Bankruptcy Act, by Puget Sound Products Co., a corporation, on February 2, 1951, in accordance with the provisions of Title 11, U.S.C.A., Sec. 526 (Tr. 3 to 10, inc.), and the entry of order on February 3, 1951, approving such petition, pursuant to Title 11, U.S.C.A., Sec. 541 (Tr. 11 to 14, inc.). Thereby, the District Court acquired exclusive jurisdiction of the Puget Sound Products Co. and its property wherever located, by virtue of Title 11, U.S.C.A., Sections 511 and 549.

On January 21, 1952, the appellee, Kenneth S. Treadwell, was appointed as Trustee in Bankruptcy of the Puget Sound Products Co. (Tr. 15, 16) and duly qualified as such Trustee.

The order of February 3, 1951 (Tr. 11 to 14, inc.) referred all matters arising in the proceeding, except such matters as are reserved to the Judge by the provisions of the Bankruptcy Act, to Van C. Griffin, Referee in Bankruptcy, as Referee-Special Master, to determine and enter orders thereon.

One of the proceedings involved on this appeal was instituted by the Trustee for Puget Sound Products Co. on October 3, 1952, by the filing with the Referee-Special Master of a petition for an Order to Show Cause directed to the appellant, Nelse Mortensen & Co., Inc. (Tr. 17, 18) requiring it to appear and show cause why an order should not be entered decreeing that all property listed by the Trustee in the inventory filed by him is free and clear of any right, title, claim or interest of the appellant. An Order to Show Cause was issued on the same day (Tr. 19, 20), and the appellant, on October 29, 1952, filed its answer claiming title to certain property which it alleged constituted fixtures and appurtenances to the real estate at Houghton, Washington, then owned by appellant and which had been formerly owned by Puget Sound Products Co. (Tr. 20 to 22, inc.).

The jurisdiction to hear this proceeding was conferred on the bankruptcy court by Title 11, U.S.C.A., Sec. 11(6) and Sec. 11(7).

The appellee, Seattle Association of Credit Men,

Inc., which held a chattel mortgage upon the personal property of Puget Sound Products Co., filed a reply to the claim of appellant (Tr. 23 to 26, inc.).

On January 12, 1953, the Referee-Special Master entered his Findings of Fact and Conclusions of Law (Tr. 25 to 45, inc.) and on the same day entered his "Order on Order to Show Cause" (Tr. 46) adjudging that all of the property listed in the trustee's inventory is free and clear of any right, title and interest of the appellant, except the fire prevention system which it adjudged to be the property of appellant.

The other proceeding involved on this appeal is the claim of Nelse Mortensen & Co., Inc., against the Trustee, for reasonable rental for the use and occupancy of the real estate owned by appellant, from the date it acquired title to the real estate, November 5, 1951, to the 1st day of September, 1952. No pleadings or petitions were filed in connection with this claim, but it was heard by the Referee-Special Master and determined in a summary manner, with the claimant and the Trustee appearing generally and submitting the matter to the bankruptcy court for determination. The claim was one arising in connection with the administration of the bankrupt's estate. The jurisdiction to hear this claim for rent is conferred by Title 11, U.S. C.A., Sec. 11(7).

On January 12, 1953, the Referee-Special Master entered his Findings of Fact and Conclusions of Law on the application for allowance of rent (Tr. 47 to 49, inc.) and on the same day entered an "Order on Application of Nelse Mortensen & Co., Inc., for Allow-

ance of Reasonable Rent" (Tr. 50), denying and disallowing the claim.

On January 16, 1953, the appellant, Nelse Mortensen & Co., Inc., filed its Petition for Review of both the "Order on Order to Show Cause" and the "Order on Application of Nelse Mortensen & Co., Inc., for Allowance of Reasonable Rent," in accordance with the provisions of Title 11, U.S.C.A., Sec. 67(c) (Tr. 51 to 53, inc.). As required by Title 11, U.S.C.A., Sec. 67(a)(8), the Referee prepared and transmitted to the District Court his "Referee's Certificate on Review—Re Mortensen's Claim of Ownership" (Tr. 54 to 56), and his "Referee's Certificate on Review—Re Mortensen's Claim for Storage or Rent" (Tr. 56 to 59), together with a statement of the questions presented, the findings and orders thereon, the petition for review, and transcript of the evidence, and all exhibits. Both of said certificates on review were filed on February 9th, 1953.

On April 6, 1953, the Judge of the District Court entered an "Order on Review of 'Order on Order to Show Cause Directed to: Nelse Mortensen & Co., Inc.'" affirming the order entered by the Referee-Special Master on January 12, 1953 (Tr. 59, 60).

On the same date an "Order on Review of 'Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent'" was also entered by the Judge of the District Court, affirming the order entered by the Referee-Special Master (Tr. 61, 62).

Within thirty days thereafter the appellant filed his notice of appeal to the United States Court of Appeals

from both of the said orders of the District Court (Tr. 62), and its cost bond on appeal (Tr. 63, 64).

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under Title 28, U.S.C.A., Sec. 1291, and Title 11, U.S.C.A., Sec. 47(a).

## STATEMENT OF THE CASE

There are two separate matters involved upon this appeal. The first is the question of the ownership of certain property, which the appellant claims constitutes fixtures and a part of the real estate belonging to appellant. The other is the amount of rent, if any, to which appellant is entitled on account of the use and occupancy of its real estate by the Trustee of Puget Sound Products Co. during the period from November 5, 1951, to September 1, 1952. The facts relative to these two matters will be stated separately.

### (1) Appellant's Claim of Ownership

On June 19, 1941, the Defense Plant Corporation, an agency of the United States of America, acquired title to the real estate involved in this proceeding (Exhibit 1, Tr. 79, 80).

During 1941 or 1942 the present building was constructed on this property by the Defense Plant Corporation (Tr. 208), to be used as a "steel fabricating shop." At the same time, as a part of the building, and for the more convenient use thereof as a fabricating shop, overhead bridge cranes were installed in the building. The crane posts and rails and bracing were constructed as part of the original plans (Exhibits 12 to 15, Tr. 209); the cranes were constructed for

the job and installed in the building (Tr. 209 to 212) during the original construction; and the tracks for the cranes were set on reinforced concrete foundations specially constructed (Tr. 211). A transformer vault was also constructed for the building (Tr. 211) and electric wiring was installed as part of the original contract (Tr. 213). The overhead sprinkler system was also installed at the time the building was built (Tr. 213).

On December 16, 1947, the real estate was deeded to Puget Sound Products Company (Exhibit 3, Tr. 83 to 86, incl.), and on the same day a Purchase Money Mortgage was executed by the Puget Sound Products Company to the Reconstruction Finance Corporation (Exhibit 2, 81, 82), covering the real estate "together with the building, structures and improvements located thereon."

At the time of the purchase of the property by the Puget Sound Products Company, the two cranes involved herein, the electrical power system, the auxiliary fire pump used in connection with the fire protection system on the docks, the compressor used for the overhead fire protection system, and the Trumbull electric switchboard, were located upon the property, and were described and referred to in the deed of conveyance (Exhibit 3, Tr. 84, 85). The thirteen transformers were also conveyed to the Puget Sound Products Company by the same instrument, although Mr. Worth Goss, in his testimony, claimed that only one or two transformers were there at the time the property was acquired, and the others were assembled from other locations (Tr. 133, 134). In any event, it

is clear that all the transformers were either on the property at the time it was acquired, or were placed thereon immediately thereafter (Tr. 137). They are installed in the same manner that transformers are usually installed (Tr. 179), and have been in continual use (Tr. 180). If they were taken out, there would be no light or power for the building (Tr. 189), and they furnish the power for the operation of all power equipment, including the cranes (Tr. 179).

The Trumbull electric switchboard was in the property at the time it was acquired and is still in the same position (Tr. 138, 140, 141). It serves the purpose of turning on and off the power to various parts of the plant (Tr. 182), and is connected with a heavy network of wiring, mostly in conduit, under the floor, to various parts of the building (Tr. 223).

The heating system in the building was placed therein after the building was acquired by the Puget Sound Products Company, about January, 1948 (Tr. 139). It is an oil burner, connected by copper tubing to underground oil tank (Tr. 226, 227). It was fastened to the columns of the building in such a way that, when it was moved (under stipulation of the parties) to another part of the building, not all of it could be salvaged (Tr. 234, 235).

On the east side of the building is a diatherm boiler, which the building was extended in order to house (Tr. 143, 144, 226). It was installed in the building in 1948 by the Puget Sound Products Company (Tr. 146). It is set on a concrete base, in a large hole in the floor (Tr. 190, 225, 226) or pit, ten or twelve feet

deep, and is connected to a network of steam pipes (Tr. 229) and is fired with oil which reaches the boiler from underground tank through tubing which is under the floor (Tr. 230).

The auxiliary fire pump on the dock is connected with the fire protection system, and was acquired by the Puget Sound Products Company at the time the property was purchased (Exhibit 3, Tr. 84). Mr. Goss testified that it was not necessary to the use of the fire protection system, unless there should be a failure of the Kirkland water supply (Tr. 183), but Mr. Hendrickson testified that the system would not work without this pump (Tr. 220, 221) and that in his opinion the Kirkland system was not connected to the dock fire protection system (Tr. 233). In any event, the auxiliary fire pump was and still is a part of the fire protection system.

The overhead fire protection system in the building was adjudged to be a part of the building by the Referee-Special Master, but he refused to adjudge the compressor used in connection therewith to be a part of the system. The compressor is a necessary part of the fire protection system, which is controlled by air pressure in the pipes (Tr. 221, 222), and the system would not work if the compressor were not attached. The system is in the same condition now as when it was acquired by appellant (Tr. 222).

The Purchase Money Mortgage, dated December 16, 1947, in favor of the Reconstruction Finance Company (Exhibit 2, Tr. 81, 82) covering the real estate "together with the building, structures and improvements located hereon," was foreclosed in Cause No. 2479 of

the United States District Court for the Western District of Washington, Northern Division in the case of United States of America, plaintiff, v. Puget Sound Products Company, a Washington corporation, Seattle Association of Credit Men, a Washington corporation, et al., defendants. In the Amended Complaint in that case filed on June 3, 1950, and in the Findings of Fact which were signed and filed on September 5, 1950, the mortgaged property was described as the real estate "together with the buildings, structures and improvements located thereon" (Exhibit 4, Tr. 90, 104).

The Seattle Association of Credit Men, which held a mortgage upon the real estate as well as upon certain personal property, was made a defendant in the foreclosure action, and appeared therein, but failed to answer the complaint of the plaintiff, and was adjudged in default on September 5 ,1950 (Tr. 87, 100 101).

Pursuant to the decree of foreclosure, the property was sold by the United States Marshal to the United States of America, and an order was entered confirming the sale on November 15, 1950 (Tr. 117 to 119, incl.).

At the time of the foreclosure of the real estate mortgage by the United States, the Puget Sound Products Company was insolvent, or at least, was having serious financial difficulties. It had given to the Seattle Association of Credit Men a trust mortgage and a Chattel Mortgage on July 7, 1949, covering all of its real and personal property, in the amount of $80,000.00 (Exhibit 10, Tr. 168 to 172). On June 27, 1949, it had

also given a chattel mortgage to the United States Sheetwood Company, which was assigned in August, 1949, to W. L. Grill (Exhibit 18, Tr. 250 to 253).

Shortly before the time for redemption from the Marshal's sale of the real estate on foreclosure of the mortgage would expire, the appellant, Nelse Mortensen & Co., Inc., for a consideration of $750.00, purchased from the Seattle Association of Credit Men, Inc., its right to redeem the property from the Marshal's sale (Exhibit 4, Tr. 120, 121; Exhibit 3, Tr. 353, 354). Its notice of intention to redeem the property was then given, and on November 5, 1951, the appellant paid to the United States Marshal $50,710.84 for redemption of the property; and pursuant thereto the United States Marshal's Deed on Foreclosure was delivered to appellant on January 21, 1952 (Exhibit 5, Tr. 126 to 130, incl.).

**(2) Appellant's Claim for Rent**

The fabricating plant located on the property acquired by the appellant is located in a building approximately 90 feet wide and 300 feet long (Tr. 147). During the period from November 5, 1951, to September 1, 1952, more than half of the space in the building was used and occupied by the Puget Sound Products Co. and its Trustee (Tr. 269 to 271, 277, 278). The testimony shows without dispute that the reasonable value of the use of this property was $500.00 per month (Tr. 300, 307). In fact, Mr. Goss himself testified that they would be willing to pay $500.00 per month after the first six months (Tr. 371). $100.00 per month was received from Edward Heller as rental for the

laboratory space on the property, which would make the net amount which the appellant claims $400.00 per month for the ten-month period involved. The reasonableness of the claim for rent is further substantiated by the fact that a written lease was entered into effective September 1, 1952 (Exhibit 1, Tr. 271, 277) for space less than that which the Trustee occupied during most of the period, at the agreed monthly rental of $400.00.

The refusal of the Referee-Special Master to recognize and allow the claim for rent was based upon an alleged oral agreement entered into prior to the time Nelse Mortensen & Co., Inc., had acquired the property, to the effect that the Puget Sound Products Co. might have free use of the property for a period of six months (Tr. 48, 49). The circumstances which were claimed to have resulted in such an agreement were substantially as follows:

After it had filed its petition for reorganization in February, 1951 (Tr. 3 to 10, inc.), the directors of the Puget Sound Products Co., including Mr. Worth Goss, were acting as trustees for the debtor in possession of its property. It was attempting to find someone who would purchase the real estate, and who would permit it to remain in possession, at least temporarily, in order that it might try to work out some reorganization plan.

Shortly before the time for redemption from the Marshal's sale would expire, negotiations for the sale of the property were conducted with the appellant, Nelse Mortensen & Co., Inc., which was interested in

acquiring the property. Mr. Goss, on behalf of Puget Sound Products Company, offered to sell the equity of redemption in the real estate to Nelse Mortensen & Co., Inc., in return for six months' free occupancy of the premises, and to allow appellant to use any of the property not required for the operations of the Puget Sound Products Company (Tr. 194 to 197, 370, 371, 372). However, after investigation, it was found to be impossible for appellant to acquire title to the property through the Puget Sound Products Company, and the matter was dropped (Tr. 265, 311, 346, 347). The Puget Sound Products Company never, at any time, redeemed the property from the Marshal's sale, nor sold its equity of redemption, or any other property to Nelse Mortensen & Co., Inc. (Tr. 202), and all negotiations with reference to free rent for Puget Sound Products Company occurred during these preliminary negotiations, and prior to the time that appellant acquired title to the property (Tr. 379).

## STATEMENT OF POINTS TO BE URGED

1. The District Court erred in entering the "Order on Review of 'Order on Order to Show Cause Directed to Nelse Mortensen & Co., Inc.'" on April 6, 1953, wherein the petition for review of order entered January 12, 1953, by the Referee-Special Master, adjudging that all of the property described in the Trustee's inventory is free from any claim, right, title or interest of Nelse Mortensen & Co., Inc., was dismissed, and the said order of the Referee-Special Master was affirmed.

2. The District Court erred in failing to reverse the

said order of the Referee-Special Master, and to adjudge that the following described property constitutes fixtures, and is a part of the real estate belonging to the appellant, Nelse Mortensen & Co., Inc., to-wit:

a. A 10-ton bridge crane and a 15-ton bridge crane.

b. Electrical lighting and power system, including transformers, wiring and equipment.

c. Heating system.

d. Auxiliary fire pump used for and connected with fire protection system on docks.

e. Boiler located on the east side of appellant's building, together with pipes and equipment.

f. Compressor used for and connected with overhead fire protection system.

g. Trumbull electric switchboard.

3. The District Court erred in entering the "Order on Review of 'Order on Application of Nelse Mortensen & Co., Inc., for Reasonable Rent'" on April 6, 1953, wherein the petition for review of order entered by the Referee-Special Master on January 12, 1953, denying and disallowing application of Nelse Mortensen & Co., Inc. for reasonable rent, was dismissed, and the said order of the Referee-Special Master was affirmed.

4. The District Court erred in failing to reverse the said order of the Referee-Special Master, and to allow to the appellant, Nelse Mortensen & Co., Inc., reasonable rent for the property used and occupied by the Trustee herein, for the period from November 5, 1951, to September 1, 1952, at the rate of $400.00 per month, or a total of $4,000.00.

## SUMMARY OF ARGUMENT

All of the items of property above referred to were placed in the building by the owner thereof, some of them by the Defense Plant Corporation, and some of them by the Puget Sound Products Company, in order that the building might be better adapted for use as a manufacturing or fabricating plant, and with the intention of making the equipment a permanent part of the property. They constituted fixtures or improvements to the real property and became a part thereof.

When the United States of America foreclosed its mortgage upon the real estate in Cause No. 2479 of the United States District Court for the Western District of Washington, Northern Division (Tr. 87 to 119, inc.), all of these fixtures and improvements, as well as the land itself, were sold to the United States as purchaser at the Marshal's sale, subject only to right of redemption. By the Marshal's Deed on Foreclosure (Tr. 126 to 130, inc.), the appellant, Nelse Mortensen & Co., Inc., acquired the same title that the United States of America would have acquired if no redemption of the property had been made.

The chattel mortgage in favor of the respondent, Seattle Association of Credit Men, Inc. (Exhibit 10, Tr. 168 to 173) was subsequent and inferior to the mortgage of the United States upon the real estate, and by the foreclosure of the mortgage in a suit in which said respondent was a party defendant, the lien of the chattel mortgage upon any property which constituted fixtures and improvements to the real estate was extinguished.

Nor was there ever any severance of the disputed items of property from the real estate. The chattel mortgage in favor of the United States (Exhibit 9, Tr. 159 to 163) merely created a lien which *might have* resulted in a severance if the mortgage had been foreclosed, but this mortgage was paid in full (Tr. 164), and upon payment thereof the potential possibility of severance of the fixtures as a result of the chattel mortgage was terminated.

As to appellant's claim for reasonable rental for the property during the period from November 5, 1951, to September 1, 1952, the evidence is clear and undisputed that the Trustee for Puget Sound Products Co. used and occupied the portion of the property for which rental was requested during all of this time, and that the sum of $400.00 per month was the reasonable rental value of this portion of the property. The alleged agreement that the Puget Sound Products Co. was to have "free rent" for a period of six months was not established by the evidence, which conclusively showed that all conversations and negotiations in reference thereto were predicated upon the appellant's acquiring title from the Puget Sound Products Co., and that no such deal was ever consummated. Nor was there any consideration for any alleged promise to allow free rent, upon which to base a contract; and no agreement on behalf of the appellant to allow free rent was ever made. Under the evidence appellant was entitled to allowance of this rent as an expense of the administration of the estate.

## ARGUMENT AND AUTHORITIES

### I.

### The Property Claimed by Appellant Constituted Fixtures and Improvements, and Is a Part of the Real Estate.

The elements essential to establish that each and all of the items of property claimed by appellant are fixtures and a part of the real estate exist in this case. All of them are either actually annexed to the real estate or permanently installed therein, and applied to the purpose of making the building suitable for use as a manufacturing or fabricating plant; all of them were installed by the owner of the property for the purpose of making a permanent accession to the freehold. The removal of the fixtures would convert the property into a bare frame building, without light or power, without heat, and without the boilers and cranes necessary for use of the property for the purposes for which it was constructed.

The case of *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, is a leading case in the State of Washington on the subject of what constitutes fixtures, and has been cited and followed in numerous later cases. In that case, title to the real estate had been acquired by purchase of the real estate at mortgage foreclosure sale. The Supreme Court in that case held that the furnace and boiler, piping and plumbing materials and radiators, opera chairs, drop curtains and scenery, and appliances for raising and lowering the same, and electric switch board, were a part of the real estate and passed to the purchaser at the sale upon foreclosure of a real estate mortgage. In that case, the court said:

> "The true criterion of a fixture is the united application of these requisites: (1) actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold."

In the case of *Cutler v. Keller*, 88 Wash. 334, 153 Pac. 15, a frame building intended for a moving picture studio was constructed on the land. It was set upon posts and was capable of removal without injury to the land. The laborers who constructed the building, and the materialmen, filed liens against the property, and contended that their liens were prior to the lien of mortgages on the real estate. In holding that the building had become a part of the real estate and that, therefore, the lien of the real estate mortgages was prior to the liens of the laborers and materialmen, the court said:

> "When buildings are placed by the absolute owner of land on which they rest, their quality of removability without injury to the freehold is not usually a factor of controlling importance as between mortgagor and mortgagee, *Rowland v. Sworts*, 17 N.Y. Supp. 399, though it may be as between landlord and tenant or licensor and licensee.
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> "'Fully as much importance is attached to the relation of the party making the annexation to the land and the permanency and habitual character of the annexation, as is paid to the manner or form of the fastening. When the absolute owner of land, for the better use of his land, erects property upon, or attaches it to the freehold, it will go to

his heir, or pass by deed, to his grantee, and the same general rule applies between mortgagor and mortgagee, but as between landlord and tenant and licensor and licensee, this rule is relaxed, with a view to the encouragement of mechanical and agricultural pursuits.' Tiedeman, Real Property (3d ed.), p. 28, §17.

"Though the rule has become much relaxed as between landlord and tenant, especially as to the things affixed for the purposes of trade, manufacture or agriculture, the same strict rule which applies as between heirs and executors applies as between vendor and vendee, and mortgagor and mortgagee, unless excepted in express terms from the conveyance or mortgage."

The case of *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 161 Pac. 478, involved the determination of the question as to whether fixtures placed upon the property by a tenant become a part of the real estate. The Supreme Court, in that case, pointed out the distinction between the rule as applied to landlord and tenant, and the rule applicable where the fixtures are placed upon the property by the owner thereof. In that case the court said:

"In determining whether a chattel which has been anneyed to the freehold is a trade fixture or a part of the realty, the cardinal inquiry is into the intent of party making the annexation. Often there is difficulty in determining the intent, but, whatever may be the legal relation of the parties between whom the controversy is waged, when the intent is discovered it is generally controlling. The intent is not to be gathered from testimony of the actual state of the mind of the party making the annexation (*Washington Nat. Bank v. Smith*, 15

> Wash. 160, 45 Pac. 736); but is to be inferred, when not determined by an express agreement, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made. * * *
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> "Again, a different rule obtains for determining the intent when the question arises between landlord and tenant, or licensor and licensee, than obtains when it arises between grantor and grantee, mortgagor and mortgagee, or heirs and executors. When the annexation is made by a tenant or licensor the presumption is that he did not intend to enrich the freehold, but intended to reserve title to the chattel annexed in himself, while from an annexation by the owner of the property, the presumption is the other way [Citing cases]."

In *Siegloch v. Iroquois Mining Co.*, 106 Wash. 632, 181 Pac. 51, there was involved a contract for the sale of certain mining claims which provided that in case of default the purchaser would deliver up possession of said mining claims "together with all improvements placed thereon." It will be noted that in the case at bar, the purchase money mortgage from the Puget Sound Products Company (through which Nelse Mortensen & Co., Inc., acquired title to the property) covered the real estate "together with the buildings, structures and improvements located thereon." In holding that a drill press, a pressure tank, a Sullivan drill sharpener, a Delco light plant, four galvanized iron water tanks, about 1800 feet of rails laid in place, and 1600 feet of pipe, which were more or less attached to the freehold, became a part of the real estate and passed to the own-

ers of the property on the forfeiture of the contract, the court said:

> "We think the term 'improvements,' as here used, must have a somewhat broader signification than that which is usually accorded to the term 'fixtures,' and that the rights of the parties are to be determined by the meaning of this term rather than by the meaning of the word fixtures. By the term improvements, however, not everything placed upon the property will pass to the owner on a retaking of possession after default. The term must mean improvements of the realty; that is to say, such things as are placed thereon by the way of betterments which are of a permanent nature and which add to the value of the property as real property. This would include buildings and structures of every kind, and also such machinery as was placed thereon of a permanent nature and which tended to increase the value of the property for the purposes for which it was used; in this instance, those things of a permanent nature which tended to increase the value of the property as a mine. Much can pass thereunder which, strictly speaking, cannot be denominated fixtures, and which in the absence of such a condition might be taken away.
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> "Turning to the evidence, we find nothing which the court awarded the owners which cannot be said to be an improvement of the property. It must be borne in mind that this is a mining property, having no value over and above the surrounding property unless the ores it contains can be extracted from it. To extract these ores profitably and successfully machinery of the sort here in question is an essential. It is all attached to

> the realty; is fixed in place and permanent in the sense that it can remain so attached and fixed until destroyed by the elements or worn out by use. Plainly, we think, these articles are improvements of a permanent nature, which enhance the value of the realty for the uses for which it is intended.
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> "The authorities clearly distinguish between the word 'improvements' and the word 'fixtures', holding that under the former term much will pass which would be excluded under the latter."

In the case of *King v. Title Trust Co.*, 111 Wash. 508, 191 Pac. 748, it was held that an elevator installed in an apartment house became a part of the real estate, and subject to the claims of the mortgagee and lien claimants, even though the owner and the seller of the elevator had agreed that it was to be personal property until the purchase price had been paid.

In the case of *Reeder v. Hudson Consolidated Mines Co.*, 118 Wash. 505, 203 Pac. 951, it was held that a 10-stamp quartz mill and machinery belonging thereto, and an electric transformer, an electric motor and certain "T" rails located on mining property were part of the real estate, and that the lien of the holder of a mortgage on the real estate was superior to the claim of a creditor who had attached the property by virtue of a writ of attachment. In that case it was said:

> "In determining whether a chattel annexed to the freehold is a trade fixture or a part of the realty the principal inquiry is into the intent of the party making the annexation. This may sometimes be difficult, but, whatever may be the legal relation of the parties waging the controversy

where the intent is discovered it is generally controlling.

* * *

"In the present case, the evidence shows that the property in question was attached to the real estate as firmly as it appears to have been reasonably possible to attach it, and highly important, it was so attached by the owner himself. * * *. The presumption must be indulged in that they were attached by the owner with the intention to enrich the freehold. They were conveyed by a warranty deed by the owner, who had annexed them, the consideration for which deed was a real estate mortgage back that covered not simply the mining claims as such, but with the added words, 'together with all improvements'."

In *Hall v. Dare*, 142 Wash. 222, 252 Pac. 926, it was held that a flag pole 60 feet long and 9 inches in diameter was a fixture and a part of the real estate, and that the purchaser of the property at mortgage foreclosure sale obtained title to the flag pole, even though it could be removed without material injury. The court said:

"It is argued, however, that this flag pole was not physically attached to the realty. True, it was not attached in such a manner as to require the actual breaking of any material in order to remove it. * * *. However, we think not necessary that there should be such an absolute physical attachment or holding of the pole to the realty to make it a part thereof, in view of its size, its general character ,the permanent nature of the foundation and anchor blocks specially constructed for the holding of it, and such construction and erection of the pole having been done by the owner of

> both the realty and the pole at the time of such construction and erection. It seems to us that if the holding of the pole in place was by gravity alone, so that it could have been removed by merely lifting it out of its position without the loosening of any of its holdings, it should still be regarded as attached to the realty."

In the case of *Nearhoff v. Rucker*, 156 Wash. 621, 287 Pac. 685, it was held that a monorail installed in a building to carry lumber from the mill and deposit it in suitable places, together with the trolley and copper wire used in connection therewith, was a fixture, notwithstanding testimony that it has been so constructed that it might be taken out without injury to the property. In that case the court said:

> "We have many times held that, when the annexation of a fixture is made by the owner of the property, the presumption is that it was annexed with the intention of enriching the freehold * * *.
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> "We are compelled to conclude that, under the evidence in this case which the jury were warranted in resolving in favor of respondents, there was actual annexation to the realty, or something appurtenant thereto; that there was application to the use or purpose with which that part of the realty was connected when so appropriated; and that the intention of the party making the annexation, who was the then owner of the major part of the premises and that part to which the annexation was made, was to make a permanent annexation to the freehold."

In the case of *Strong v. Sunset Copper Co.*, 9 Wn. (2d) 214, 114 P.(2d) 526, suit was brought to foreclose a real estate and chattel mortgage. It was held

that certain lien creditors had priority so far as any chattels were concerned, for the reason that no affidavit of renewal of the chattel mortgage had been filed as provided by law; however, the court held that most of the items referred to in the chattel mortgage constituted fixtures, and that the claim of the mortgagee was prior to the lien of the other creditors as to that portion of the equipment which constituted fixtures. The court said:

> "The final question to be disposed of is that of whether certain items of equipment covered by the mortgage are chattels or fixtures. * * *.
>
> "* * * Practically all of the equipment which is the subject of dispute was bolted to specially prepared concrete foundations. While it is true, as respondents point out, that most of that equipment was of a stock nature, and could be removed by the mere unscrewing of foundation bolts, those two facts are not determinative of the particular issue. The evidence amply discloses that the equipment in question was intended to constitute permanent improvements, and accordingly, they constitute a part of the realty. They are fixtures, not chattels."

While the case of *Forman v. Columbia Theatre Co.*, 20 Wn.(2d) 685, 148 P.(2d) 951, was one in which the relationship of landlord and tenant was involved, rather than vendor and vendee, or mortgagor and mortgagee, the lease involved therein contained a provision that at the expiration of the lease the tenant "will leave on said premises all permanent improvements and repairs made during the term." The court affirmed a judgment awarding to the landlord certain conduits and wiring, switches, switch boxes, signs, and

other articles of improvement placed in the theatre building. In that case the court said:

> "In this connection, it must be borne in mind that all of the contested items were put upon the premises by the Columbia Theater Company prior to June, 1936, which was during the time the company was in possession of the premises under the lease agreement. It must be presumed that the annexations were made with the above-quoted clause ten in mind, which provided that all permanent improvements would be left upon the premises at the expiration of the lease." * * *
>
> "It is the conceded rule that whether or not the property annexed to the freehold becomes a part of the realty depends upon the intention of the party making the annexation. *Strong v. Sunset Copper Co.*, 9 Wn.(2d) 214, 114 P.(2d) 526, 135 A.L.R. 423. The theater building owned by respondents was rented for one purpose—the operation of a motion picture theater. The improvements and additions were made for the sole purpose of improving the building for that purpose. The new wiring, the Ozite soundproofing on the walls were merely for the purpose of making the building suitable for the showing of sound pictures. The portion of the wiring which is not imbedded in the walls and floors is attached to the walls by straps which are nailed to the walls. The Ozite is glued to the wall, and the urinal is cemented into the wall and floor. These items definitely 'savor of realty', to use the expression of the *Keller* case, *supra*. This applies to the electric sign, the false ceiling on the marquee, the reader boards attached thereto. All are physically attached to the building, and the ease or hardship incident to removing them is immaterial."

In the case of *Westinghouse Co. v. Hawthorne*, 21 Wn.(2d) 74, 150 P.(2d) 55, it was held that certain electric wiring, wire holders, ells, conduits, switches, pushbuttons, line starters and heaters, entrance caps, gaskets and covers, copperweld ground rods, carriage bolts, pulleys, together with motors and siding rails, used in the course of alteration and improvement of a building, constituted fixtures, and that the one who furnished these items was entitled to a mechanic's lien on the real estate. The court said:

> "Considering the question of the intention of the party making the annexation, this court, in the case of *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736, said: 'That the intention with which machinery is placed upon the real estate is one of the elements to be taken into consideration in determining whether or not it remains a chattel or becomes a part of such real estate is conceded, but it does not follow that such intention can be shown by testimony as to the actual state of the mind of the person who attached the machinery to the real estate at the time it was attached. On the contrary his intention must be gathered from circumstances surrounding the transaction and from what was said and done at the time, and cannot be affected by his state of mind retained as a secret.'
>
> "Upon this same subject, in the later case of *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 161 Pac. 478, this court said:
>
> " 'The intent is not to be gathered from testimony of the actual state of mind of the party making the annexation * * * but is to be inferred, when not determined by an express agreement,

from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made.'

"In the case at bar, the appliances were ordered by a conditional vendee, the predecessor in interest of respondents, whose intention to enrich the freehold may be assumed, other requirements being proven."

In *Strain v. Green*, 25 Wn.(2d) 692, 172 P.(2d) 216, the court held that a chandelier and side lights annexed to the ceilings in a house, and mirrors attached to plywood backing, were fixtures and a part of the real estate. In that case the owners of the property testified that they never had any intention that the chandelier, side lights and mirrors should become fixtures, and that they had removed them as personal property from the former houses in which they had lived. However, the court said:

"It has never been the law of this jurisdiction, nor, we think, of any other, that the secret intention of the owner who affixed the disputed article, of itself, determines whether or not it was a fixture or a mere personal chattel." * * *

"Respondents in this case were owners when they installed the articles in question. The presumption, then, is (as held in the last of the quotations hitherto made from *Ballard v. Alaska Theatre Co., supra*) that it was their intention to enrich the freehold. This presumption is not overcome by evidence of secret intention, as is shown by the first of the quotations hitherto made from the same case, and then more plainly by the other quotation to the same effect from *Washington*

*Nat. Bank v. Smith*, supra. Nor is the fact that the respondents successfully removed the articles from house to house of much, if any, probative value."

In 36 C.J.S., Fixtures, Sec. 43, it is said:

"* * * In deciding whether an article used in connection with real property should be considered as a fixture and a part and parcel of the land, as between a mortgagor and mortgagee or vendor and purchaser of the land, the usual tests are real or constructive annexation of the article to the realty; appropriation or adaptation to the use or purpose of the realty with which it is connected; and the intention to make the annexation permanent. The manner of annexation of chattels to realty is not controlling on the question as to whether they constitute fixtures, but the purpose and intent of annexation are the most important considerations.

"The rule for determining what is a fixture is construed strongly against the mortgagor or vendor and in favor of the mortgagee or purchaser * * *. Many chattels are held to be fixtures, as between mortgagor and mortgagee or vendor and purchaser, which do not lose their character of personal chattels when the question is between landlord and tenant."

In the case of *re Theodore A. Kochs Co.*, 120 F.(2d) 603, 136 A.L.R. 1280, the court said:

"It is presumed without more, when machinery is installed which is indispensable to the operation of a factory, that the owner intended to affix the machinery permanently to the premises. In our case, the nature of the machinery, the manner of

its attachment, its essential relation to the business, and the fact that the annexor owned both the plant and the machinery are manifestations that at the time of the installation the annexor intended the machinery to constitute a permanent improvement of the realty. Unquestionably, in such a situation, the case-law is that the machinery becomes part of the realty and passes with it under a real estate mortgage. [Citing cases.] It is true that the machinery in question was not an integral part of the permanent buildings and was removable without injury to the freehold, but these circumstances do not militate against the conclusion that at the time of installation the machinery and plant were a single whole in the contemplation of the law."

As to those items of property which are not physically attached to the property or the building, but are used in connection with the operation of the machinery and fixtures which are annexed, the rule is stated in 109 A.L.R. 1424 as follows:

"It has been held that where the principal part of machinery is a fixture due to actual annexation to the realty, the parts of it, although not actually annexed to the freehold, are fixtures where they would, if removed, leave the principal part unfit for use, and where of themselves they are not capable of general use elsewhere * * *.

"In numerous cases, machinery and articles of various kinds used in factories, mills, etc., have been held to constitute fixtures because of their relation to or employment in connection with other machinery or apparatus which was unquestionably fixtures, or because of their essential nature as a part of the plant."

## II.

### There Was No Severance of the Fixtures and Improvements from the Real Estate.

It was the opinion of the Referee-Special Master, and apparently also of the District Court, that notwithstanding the well established law as to fixtures as hereinbefore set out, the following circumstances resulted in the property claimed by appellant being personal property, instead of fixtures and improvements to the real estate:

(1) The deed to Puget Sound Products Company (Exhibit 3, Tr. 83 to 86), after the description of the real estate, contained the following paragraph:

> "Party of the first part further conveys and quit claims to party of the second part, its successors and assigns, all interest in the following described personal property, machinery and equipment:"

and listed as such "personal property, machinery and equipment," the cranes, transformers, switchboard, air compressor, and auxiliary fire pump, which are claimed by appellant.

(2) The Puget Sound Products Company, at the time the property was acquired, executed and delivered to the Reconstruction Finance Corporaton a chattel mortgage upon this property, to secure a promissory note (Exhibits 8 and 9, Tr. 155 to 163).

(3) Thereafter, the Puget Sound Products Company included this property in chattel mortgages given to the Seattle Association of Credit Men (Exhibit 10, Tr. 168 to 173), and to United States Sheetwood Company (later assigned to W. L. Grill) (Tr. 250 to 253).

So far as the chattel mortgages to Seattle Association of Credit Men and to W. L. Grill are concerned, these were executed subsequent to the real estate mortgage under which the appellant acquired title, and could have no bearing upon the question as to whether the property covered thereby constituted fixtures as against one acquiring title by the mortgage foreclosure. The giving of these mortgages might effect a constructive severance of the fixtures therein described from the real estate so far as the mortgagees were concerned, but no severance could be effective as against the prior rights of the holder of the real estate mortgage.

The fact that the deed for the real estate (Exhibit 3, Tr. 83 to 86) particularly described certain items of property located in the building on the premises, and referred to them as "personal property, machinery and equipment," would not have the effect of severing any of the property therein described from the real estate, if it was in fact a part of the real estate, particularly where the Purchase Money Mortgage taken at the time covered the real estate "together with the building, structures and improvements thereon." It is not unusual for items, constituting fixtures, to be referred to separately in a deed — very often deeds include specific reference to furnaces, plumbing, light fixtures, window shades, and other items of property, which already constitute part of the real estate, and certainly the including of such items neither severs from the real estate any articles which are in fact fixtures, nor makes a part of the real estate any items which are in fact personal property.

While it was not specifically referred to in the Referee-Special Master's memorandum decision herein nor in the Findings of Fact, we believe that the strongest argument in favor of the proposition that the items of property were severed from the real estate is the fact that the Reconstruction Finance Corporation took a chattel mortgage from the Puget Sound Products Company upon the cranes, transformers, switchboard, air compressor and auxiliary fire pump, together with other property (Exhibit 9, Tr. 159 to 163). The giving and acceptance of this chattel mortgage, in our opinion, constituted a severance of these items from the real estate, and made them personal property, *insofar as the chattel mortgage was concerned, but only for the purpose of the mortgage.* When the mortgage was paid and released, the property covered thereby resumed its original status as fixtures annexed to the land.

The case of *Parrish v. Southwestern Washington Production Credit Association*, 41 Wn.(2d) 586, 250 P.(2d) 973, decided December 4, 1952, is exactly in point so far as this question is concerned. In that case Rolla Parrish and Miriam Parrish, his wife, for several successive years, had given to Southwestern Washington Production Credit Association chattel mortgages covering many articles of machinery and equipment located upon a cranberry farm (known as cranberry bog). Rolla Parrish and Miriam Parrish were divorced, and the real estate was deeded to Rolla Parrish, who gave to Miriam Parrish a mortgage covering the real estate, together with the appurtenances and fixtures. Rolla Parrish continued to operate the farm, and in order to finance such operation gave to the

Production Credit Association chattel mortgages covering the same property as had been included in the mortgages given during the preceding years, including sprayer, pumps, motors, transformers and electrical equipment. Suit was brought by Miriam Parrish to foreclose her real estate mortgage, and the Production Credit Association alleged that the lien of its chattel mortgages was prior to the claim of the plaintiff. The court found:

> "* * * That the watering and sprinkling system, including pipe lines consisting of trunk lines and lateral pipe lines, sprinkler heads, pumps, motors, frames, power poles and wiring and transformers, constitutes an integrated system installed with the intention of making a permanent improvement to the property, actually annexed to the realty, and designed and constructed to make the particular land a commercial cranberry bog * * *."

The Supreme Court, after citing cases heretofore set out in this brief, said:

> "Applying these principles to the established facts of this case, we conclude that the trial court did not err in holding that the items were fixtures within the provisions of respondent's real estate mortgage.
>
> "Appellant contends, however, that even if it should be determined that the chattels would ordinarily be fixtures, respondent cannot now be heard to make that contention. Appellant bases this argument on the fact that respondent had previously joined in executing chattel mortgages on the identical items of property, thereby declaring them to be personalty. In the words of appellant, as stated in its brief:

> "'* * * having once intended that they should be chattels, the respondent cannot now be heard to say that they are fixtures'."

After quoting from the case of *Planter's Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 128 S.E. 876, 41 A.L. R. 592, and from 36 C.J.S. 920, Fixtures, Sec. 13, the decision of the Supreme Court continues as follows:

> "Although the foregoing authorities refer to a vendor-vendee relationship, we feel that the reasoning expressed applies with equal force to the factual situation involved here, and hold that, upon satisfaction of the mortgages, any right which the appellant may have had to contend that the items were personalty, was extinguished. As between appellant and Rolla and Miriam Parrish, *upon satisfaction of the chattel mortgages, the machinery and equipment involved lost their status as chattels and resumed their original status as fixtures annexed to the land.*" (Italics ours)

The chattel mortgage which was given by the Puget Sound Products Company to the Reconstruction Finance Company covering the fixtures in this case was fully paid and released, and the potential severance of the fixtures from the land (which would have become an actual severance if the chattel mortgage had been foreclosed) was extinguished, and the property resumed or retained its status as fixtures and a part of the real estate.

## III.

**Appellant's Claim for Rent Was Clearly Established by the Evidence.**

The mere statement of the case in regard to the claim of Nelse Mortensen & Co., Inc., for reasonable rent, clearly establishes its right thereto. The Trustee remained in possession of the real estate at all times between November 5, 1951, and September 1, 1952. The undisputed testimony was to the effect that $400.00 per month was the reasonable rental value of the real estate (Tr. 300, 307).

The claim that Mortensen had agreed to allow six months free rent to the Puget Sound Products Co. was not established by the evidence, and the burden of proving such claim was upon the respondent. All negotiations and conversations testified to in an attempt to establish such an agreement were predicated upon Nelse Mortensen & Co., Inc., buying the property from the Puget Sound Products Co. It was found to be impossible to obtain title in this way, and the negotiations were dropped. It then became necessary for Mortensen to buy the right to redeem from the Seattle Association of Credit Men, Inc., and pay $750.00 therefor. Neither was there any consideration for any alleged promise to allow free rent, and no contract was made to that effect.

## CONCLUSION

We respectfully submit that the record in this case established that all of the property claimed by appellant is a part of the real estate owned by it, and that the order of the District Court denying its claim there-

to should be reversed, and the said property adjudged to be the property of appellant.

The order denying and disallowing appellant's claim for reasonable rent should also be reversed, and the claim allowed in the amount of $400.00 per month from November 5, 1951, to September 1, 1952.

Respectfully submitted,

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HERMAN HOWE (*Of Counsel*)
*Attorneys for Appellant.*

No. 13862

# United States Court of Appeals

## For the Ninth Circuit

---

NELSE MORTENSEN & CO., INC., *Appellant,*

vs.

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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## BRIEF OF APPELLEES

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# United States Court of Appeals
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLEES

### STATEMENT OF FACTS

After acquiring the real estate involved in this action, the Defense Plant Corporation, a government corporation, erected a building or shed on the premises (Tr. 147) and placed therein certain machinery and equipment. In the latter part of 1947, the property was put up for sale and invitation for bids circulated, calling for offers with respect to real estate and personal property (Ex. 7; Tr. 149, 150, 151). Pursuant to this invitation, Puget Sound Products Co. submitted two bids, one for the real estate and the other for the personal property (Tr. 151, 152). The company purchased the real estate for approximately $58,000.00 (Tr. 152) and the personal property for $32,678.40 (Ex. 8; Tr. 154, 155, 156, 157).

The Reconstruction Finance Corporation, as successor to the Defense Plant Corporation, acting by and through the War Assets Administration, issued its quitclaim deed to the Puget Sound Products Co. as the purchaser (Ex. 3; Tr. 83, 84). This deed served not only as a conveyance of the real estate but also as a bill of sale covering the personal property, including machinery and equipment which is the subject of this controversy.

Thereafter, Puget Sound Products Co. gave its promissory note to the War Assets Administration, acting for the Reconstruction Finance Corporation, covering the purchase price of the machinery and equipment (Ex. 8; Tr. 154, 155, 156, 157), which was secured by purchase money chattel mortgage describing the chattel machinery and equipment (Ex. 9; Tr. 159, 160, 161, 162). The property involved in this dispute is listed as personal property in this mortgage, except for the heating system (Tr. 182, 226) and boiler (Tr. 146), which were acquired later by the Puget Sound Products Co. and used in connection with its business.

The company also gave its real estate mortgage in favor of the government agency covering the real property (Ex. 2; Tr. 81, 82, 83).

The purchase money mortgages given to the Reconstruction Finance Corporation were intentionally redrafted so as to eliminate any coverage of "after-acquired property", since the Puget Sound Products Co. desired to place additional machinery and equipment on the premises in such manner as to make it readily removable (Ex. 19; Tr. 256, 257, 258, 259).

The Puget Sound Products Co. was unable to make the payments required on its notes. Since the Reconstruction Finance Corporation was pressing for payment, certain of the mortgaged personal property was sold and the proceeds used to pay off the note secured by the purchase money chattel mortgage (Tr. 164, 263, 264). The real estate mortgage was subsequently foreclosed and the property sold to the United States of America (Tr. 117, 118, 119).

After acquiring title to the mortgaged personal property, Puget Sound Products Co. executed and delivered its chattel mortgage dated June 27, 1949, in favor of United States Sheetwood Company (Ex. 18; Tr. 250), and shortly thereafter executed and delivered its chattel mortgage in trust dated July 7, 1949, in favor of Seattle Association of Credit Men (Ex. 10; Tr. 168) as security for claims and debts totaling $80,000.00. Both mortgages covered all of the machinery and equipment involved in this proceeding.

In October, 1951, Nelse Mortensen & Co., Inc., became interested in obtaining the use of the building (Tr. 367). At the instigation of one of the officers of Puget Sound Products Co., Appellant negotiated with the Seattle Association of Credit Men for the purpose of acquiring its right of redemption (Tr. 247). On November 5, 1951, these negotiations culminated in an agreement (Ex. 3; Tr. 353, 354, 355) under which Appellant obtained redemption rights to the real estate. Appellant's attorneys represented the Seattle Association of Credit Men in giving the notice of redemption (Tr. 364) and in the

presentation of the order (Ex. 4; Tr. 122, 123, 124). Subsequently, Appellant took possession of the real estate on about November 5, 1951, pursuant to the order of redemption (Tr. 380).

Prior to the time of its acquisition of the real estate, the Appellant had full knowledge of Puget Sound Products Co.'s ownership of the disputed items of property (Tr. 196, 197, 371, 372), and Mr. Nelse Mortensen, Appellant's President, even discussed the possible purchase of some of this property from the Puget Sound Products Co. (Tr. 373). And it was during this period that Mr. Worth C. Goss, representing the Debtor in Possession, Puget Sound Products Co., negotiated with Appellant for the occupancy of the real estate in return for Appellant's free use of the cranes and other equipment (Tr. 181). Later, this matter was the subject of conversations between Mr. Goss and Mr. Nelse Mortensen and Mr. Henderson or Mr. Hendrickson, representing Appellant (Tr. 370, 371, 372, 373), with apparently mutually satisfactory conclusions (Tr. 196, 197). The matter of Puget Sound Products Co.'s occupancy of the property also was discussed with a representative of the Seattle Association of Credit Men (Tr. 247), who in turn testified that the subject was covered in conversations with one of Appellant's attorneys (Tr. 364), since such an arrangement was of benefit to the Seattle Association of Credit Men and the creditors it represented (Tr. 361).

The transcript of record in this case shows that the property items in dispute are placed, located and installed as follows:

*Cranes*: The cranes are self-controlled units, including motors, running on wheels (Tr. 138, 145). The supports consist of heavy timbers separated from the main building structure (Tr. 176) with removable fastenings (Tr. 177), or bolted to the concrete (Tr. 224, 225), but forming no part of the structural support of the building (Tr. 215).

*Lighting system, including transformers.* It is the usual network of wiring and conduit (Tr. 223), which may be removed without injury to the building (Tr. 184). The transformers are located in the vault and set free on the floor (Tr. 138, 177, 178, 179).

*Heating system.* The oil-fired heater is self-operative and portable (Tr. 182, 226, 234, 235).

*Auxiliary fire pump.* This pump sits on a platform beneath the main dock, is not a part of the dock structure, and is removable without damage to the dock (Tr. 183, 205, 232, 233).

*Boiler.* The boiler is not affixed to the property but sits on the floor (Tr. 183, 184) or pit (Tr. 225, 226), and is not connected to anything except a network of pipes now disconnected (Tr. 229).

*Compressor.* The compressor is located on the premises (Tr. 140), but there is no indication that it is affixed in any way to the premises (Tr. 231, 233).

*Trumbull switchboard.* This panel is located in the vault (Tr. 182), with material attached to it which apparently is the property of the utility company supplying the power (Tr. 182).

## ARGUMENT AND AUTHORITIES

### I.

### The Findings of Fact Should Not Be Set Aside Unless Clearly Erroneous

In the instant case, the Referee's Findings of Fact and Conclusions of Law were affirmed by the District Court. These Findings of Fact should not be set aside unless clearly erroneous. Collier, on Bankruptcy, 14th Edition, Volume 2, §25.30, on page 964, states as follows:

> "These principles have been generally affirmed by the Federal Rules of Civil Procedure. Rule 52(a) provides that in non-jury cases, whether *formally at law or in equity*:
>
> " 'Findings of Fact should not be set aside unless clearly erroneous, and due regard shall be given the opportunity to the Trial Court to judge the credibility of the witnesses.'
>
> "Thus, in *Matter of Earnest* (C.C.A. 2nd (1939)), 107 F.(2d) 760, it was stated:
>
> " 'Concurrent Findings of Fact by the Referee and Judge will ordinarily be accepted on appeal (citations omitted) but not where a mistake is clearly shown. (Citations omitted)' "

In the case of the *Morris Plan Industrial Bank v. Henderson* (C.C.A. 2, 1942) 131 F.(2d) 975, Judge Learned Hand states:

> "General order 47 requires the Judge to 'accept his' (the Referee's) 'Findings of Fact unless clearly erroneous.' These are the same words used in Rule 53(e) (2) and substantially the same as those in Rule 52(a) which requires us not 'to set aside' the Findings of a Judge unless it too is 'clearly erroneous.' * * * In the end, as we have often said, the responsibility for the right conclusion remains the

> Judge's as indeed it does ours (citations omitted) but we have again and again held that except in plain cases, he should accept the Referee's Findings. (Citations omitted) We, therefore, hold that the question is the same in this Court as it was in the District Court."

In this connection, see also *Mergenthaler v. Dailey* (C.C.A. 2, 1943) 136 F.(2d) 182, wherein Circuit Court Judge Charles E. Clark says:

> "We have the same duty as the District Court to accept the Referee's Findings unless they are clearly erroneous."

The Findings of Fact of the Referee in the case at bar are abundantly supported by the evidence as indicated in the transcript. The Referee found that the items claimed by the Appellant were personalty. The Referee found, as a matter of fact, that Nelse Mortensen & Co., Inc., and Puget Sound Products Co. had agreed that the Puget Sound Products Co. could use the premises without charge. Therefore, Nelse Mortensen & Co., Inc., should take nothing by this appeal.

## II.

### Appellant Is Bound by Agreements Fixing the Status of the Machinery and Equipment As Personalty

Agreements establishing the personal nature of articles either attached to the freehold or capable of being so attached have long been recognized by the Washington Supreme Court as binding on the parties thereto and their successors in interest. An early Washington case on this subject, which has been cited and followed many times, is *German Savings & Loan Society v. Weber,* 16

Wash. 95, 47 Pac. 224, 38 L.R.A. 267. This case involved a prior mortgagee claiming items which had been attached to a building by a materialman pursuant to an agreement between the mortgagor and the materialman that said items should be regarded as personalty. The Court held that the items, even though "fixtures", could be removed provided the realty would not be injured in the process.

In *Robinson Codfish Co. v. Porter Fish Company,* 75 Wash. 181, 134 Pac. 811, the vendor of a building containing 36 large vats used for curing codfish agreed with the conditional purchaser that the vendor should be allowed to remove said vats from the building at some later time. Several subsequent agreements were made between the parties regarding the realty but these made no special reference to the vats. Later, the vendor executed a deed to a subsequent assignee of the conditional purchaser who then declared the vats were fixtures and therefore could not be removed by the original vendor. The Court in this case summarizes its results at page 182 as follows:

> "Appellant bases its appeal upon its contention that the vats were real fixtures and passed with the deed. It does not, however, appear to us that it is necessary to determine whether the vats were fixtures or chattels, as we believe the lower court was correct in holding that they were at all times treated by the parties to the respective agreement as chattels and there was at no time any intention or purpose to pass them from the ownership of the codfish company. * * * We think it is also established that the appellant had actual knowledge of the situation as to the vats and understood that the claim

> of the codfish company as to the ownership and right of possession was acquiesced in by the creamery company. We think it, therefore, clear that, so far as the legal situation is concerned, the parties, by the express stipulation in the original contract, intended to, and did, fix the status of the vats as personal property, the possession of which was to be preserved and retained by the codfish company, and that it was likewise intended to preserve this status under the modified agreements. We do not think it will be disputed that the owner of real estate may contract or agree with his tenant that things used in the building and for that purpose attached to it may be treated as chattels and remain the property of the tenant, subject to removal at the termination of the lease. No authority will be required to establish that such is the law."

A case very similar to the one at bar which establishes the right of the Appellee in this case to retain the items as personalty is *Boeringa v. Perry,* 96 Wash. 57, 164 Pac. 773. This was an action to foreclose a chattel mortgage given by one Sewell to respondent on the pump house, motor and pipe used to irrigate Sewell's property. The pipe was embedded in the ground and was considered by the trial court to be of a permanent nature. The appellant obtained a right of entry by foreclosing Sewell's right of entry to the desert land and claimed the pipe was part of the realty. The Court held that the chattel mortgage constituted an agreement between Sewell and the chattel mortgagee and, since appellant was the successor in interest to Sewell and had notice of the chattel mortgage, the appellant was not entitled to claim the pipe as part of the realty. The Court states at page 59:

"Generally speaking, an agreement that chattels affixed to realty shall retain a personal character may be either in writing or parol. (Citations omitted) In general, it may be said that almost anything affixed to realty may by agreement be treated as personalty. Thus it has been held that houses and other buildings, machinery, railroad tracks, nursery stock, and, indeed, practically everything which before annexation was personal property may still retain their chattel character by an agreement to that effect. But the right to preserve the personal character of fixtures by agreement is limited to chattels which are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, or without destroying or materially injuring the realty to which they are attached.

* * *

"It has been held in many cases that, if competent parties make an express agreement that fixtures shall retain their character as chattels, there can be no doubt that the agreement is binding as between the parties thereto. (Citations omitted) And where one purchases an article to be annexed to the freehold which, from its character, may, after annexation, be either realty or personalty according to the intention of the parties, the giving of a chattel mortgage thereon to the seller is sufficient evidence of an intention that the fixture shall retain its character as personalty. (Citations omitted)

"An agreement that the fixture shall retain its personal character is said to be implied from the mere giving of a chattel mortgage. (Citations omitted) It is, therefore, well settled, as between Sewell and appellant, that the status of the pipe mortgaged to appellant was fixed as a chattel."

And at page 62 in the above-cited opinion, the Washington Supreme Court finds that the chattel mortgage was filed and interprets the effect of such filing under the Washington statutes as follows:

> "* * * The effect of this provision is that the due filing of a chattel mortgage, as was the case here, imports as much as actual and positive notice of the mortgage and of all its conditions to all persons dealing with the chattel thereafter."

The statements quoted above are indicative of the law throughout the United States as evidenced by the general reference works. In 36 C.J.S., Fixtures, §13, at page 917, it is stated:

> "As a general rule, parties, as between themselves, may, in their dealings with chattels annexed to, or used in connection with, real estate, fix on them whatever character, as realty or personalty, on which they may agree, such right being, in some jurisdictions, recognized by statute, and the law will enforce such understanding whenever the rights of third parties will not be prejudiced. Thus it is generally held that an agreement by the owner of the land, in favor of the owner of the article at the time of annexation, or of one of them having a lien thereon, to the effect that the article shall retain its personal character or be removable as personalty, is ordinarily valid and effective as against the former, precluding a claim by him to the article as part of the land, to the exclusion of the latter. As discussed infra §14, an implied agreement to this effect is equally effective."

In 36 C.J.S., §18b, at page 934, it is stated:

> "Apart from statute, the authorities are generally in accord that an agreement preserving the char-

> acter of a chattel to be annexed to realty, or conferring a right of removal with respect thereto, prevails as against a subsequent purchaser or mortgagee of the realty who has notice, actual or constructive, of the agreement, where, or provided, it is sometimes held, the chattel can be removed without material injury to the freehold or the usefulness of the chattel. This rule has been applied as against purchasers at a judicial sale."

The recent case of *Anderson-Tully Co. v. United States* (C.C.A. 5, 1951) 189 F.(2d) 192, indicates that the Courts are not willing to allow parties to renege on their agreements by means of mere change in legal form. In this case, the Government leased from the Anderson-Tully Co. certain lands partially under water near the city of Vicksburg, Mississippi, under a series of leases extending from 1924 through June 30, 1945. These leases provided that the Government should have the right to attach fixtures and structures which should remain the property of the Government and might be removed prior to the termination of the lease. During its tenancy, the Government filled part of this land and erected warehouses, mooring pilings and a piling structure to carry pipelines which were used to move oil from barges moored in the canal. Anderson-Tully refused to renew the Government's lease on June 30, 1945, and the Government, thereupon, informed the land owner that it would acquire the premises by condemnation. Thirty days later the Government of the United States filed a petition in condemnation to acquire a fee simple title to the land and the District Court entered an order authorizing such possession and confirming occupation of the land. The Appellant, Anderson-Tully, in this case, is de-

manding that the condemnation award include both the value of the land and the fixtures which had been placed on that land by the Government. At page 196, the Court states:

> " * * * And in determining whether an object remains personalty or becomes a part of the realty, the courts in the United States have almost universally accepted the so-called intention test. In the case at bar the United States expressly reserved title to improvements placed upon the land and there can be no presumption that the Government intended to confer public property upon appellant."

In the instant case, Appellant obtained its title to the real property by exercising the right of redemption of the Seattle Association of Credit Men after the United States Government had foreclosed the Real Purchase money mortgage Puget Sound Products Co. had given to the Reconstruction Finance Corporation. This mortgage does not mention "fixtures" and by its terms refers only to real estate. On the same day, at the same time, the Puget Sound Products Co. gave to the Reconstruction Finance Corporation a separate chattel mortgage covering all the items claimed by the Appellant, except the boiler and portable heating system. The equipment claimed by the Appellant in this case was segregated from the land and building in the "invitation for bids" issued by the War Assets Administration. The facts show that separate bids were made for both the personal property and the real property. The Appellant, through its dealings with the Seattle Association of Credit Men, Puget Sound Products Co. and W. L. Grill, had both actual and constructive knowledge of the separation of

the chattels from the real estate of the old shipyard at Houghton.

The above-cited cases and authorities as applied to the facts of this case clearly indicate that the Appellant has no right as to those chattels which its predecessor in interest sold as personalty to the Puget Sound Products Co. The portable oil heater and broiler were placed on the property after the time of the execution of the real estate mortgage to the Reconstruction Finance Corporation and are not covered by the mortgage given to the United States which was drawn so as to exclude "after-aquired property". These items are not fixtures and are not in any way subject to the claims of the Appellant.

These items of after-acquired property are not included in the real estate mortgage. The case of *Holt v. Henley,* 232 U.S. 637, 641, held that an automatic sprinkler system subject to another security instrument (and here the chattels are subject to outstanding chattel mortgages) should not be held to be a fixture and thus subject to a prior real estate mortgage. The Court says, at page 641:

> "* * * The system was attached to the freehold, but it could be removed without any serious harm for which complaint could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws. * * * "

## III.

### Chattels Have Not Reverted to Realty

On page 32 of the Appellant's brief, it is stated that the acceptance of a chattel mortgage by the Reconstruction Finance Corporation constituted a severance of these items from the real estate and made them personal property only insofar as the chattel mortgage was concerned. The Appellant then goes on to state that when the mortgage was paid and released the property thereby covered resumed its original status as fixtures annexed to the land, and cites the case of *Parrish v. Southwestern Washington Production Credit Association,* 41 Wn.(2d) 586, 250 P.(2d) 973, as being exactly in point on this question. It is difficult to understand how this case can be considered as being directly in point to establish the aforementioned proposition.

In the *Parrish* case, *supra,* Miriam and Rolla Parrish were husband and wife, and for many years had financed the operations of their cranberry bog through means of chattel mortgages given to the Southwestern Washington Production Credit Association. Thus, as between the Southwestern Washington Production Credit Association and the two Parrishes, these items covered by the chattel mortgage were established to be personalty. The only intention which could be referred to as an agreement between Rolla and Miriam Parrish was an implied agreement that, by both agreeing to mortgage these items as chattels, Rolla and Miriam were giving these items some status as chattels. There was never a chattel mortgage between Miriam and Rolla.

Miriam and Rolla contemplated a divorce, but, prior

to the divorce, all chattel mortgages executed by Miriam and Rolla in favor of the Credit Association were paid up. As part of the divorce settlement, Miriam was given a $75,000.00 real estate mortgage against the cranberry bog. Subsequent to the execution of this mortgage, Rolla alone executed chattel mortgages in favor of the Credit Association. Suit was brought by Miriam Parrish to foreclose her real estate mortgage. The chattel mortgagee, Production Credit Association, alleged that Miriam could not claim the machinery and equipment under her prior real estate mortgage because she had *at one time* executed chattel mortgages *with her ex-husband* covering the same items as chattels. The Credit Association was maintaining that Miriam could not change her intention even though her interests were changed and her real estate mortgage clearly stated that "fixtures" were included under the mortgage.

Furthermore, the Credit Association had both actual knowledge of the divorce and constructive knowledge of Miriam's mortgage covering the fixtures on the property, and of course knew that Miriam was in no way a party to the chattel mortgages made between Rolla Parrish and the Association subsequent to her divorce.

This is a very different situation than the one in which the Appellant finds itself. Appellant in this case takes only those rights that the United States Government had under its real estate mortgage. The Government itself had agreed that the chattels and the real property should be treated separately. If in the *Parrish* case Miriam Parrish had received both a real estate mortgage and a chattel mortgage from Rolla, and later had

cancelled the chattel mortgage upon receiving payment in full, as a matter of simple justice, the Court would not have allowed Miriam or her successors to seize both the chattels and the realty from Rolla under the real estate mortgage.

A case much closer in point is *Mattechek v. Pugh,* 153 Ore. 1, 55 P.(2d) 730, 168 A.L.R. 725, wherein the Court states:

> "Whether an article attached to the realty is real property or personal property is dependent, not only upon its character and the manner of its attachment, but also to some extent upon agreements, if any, relating to its status. The giving of a bill of sale to an article attached to the soil at the same time a deed is executed covering the realty is an indication that the parties intended the articles should be deemed personal property. The bill of sale in such an instance effects a constructive severance of the article from the soil and restores to it its original status as personalty. * * * In *Folsom v. Moore,* 19 Me. 252, the same principle was applied. There, according to the evidence, the owner of the real property at the time of its sale gave to the purchaser a deed, and at the same time sold as personal property a stove attached to the real property. The court, in holding that the stove was personal property, remarked: 'It would be against every principle of justice, to permit the plaintiff, after having sold it as personal, to turn around and reclaim it, as part of his real estate.' See, also, *Fortman v. Geopper,* 14 Ohio St. 558; Tiffany, Real Property (2d Ed.) §273; and 26 CJ, Fixtures, p. 676, §39. This court has recognized that parties may agree that the annexation of a chattel to the land shall not deprive it of its character as personalty. (Citations

omitted.) Likewise, this court has held that the interested parties may agree that an article already annexed to the soil shall be deemed personalty. (Citations omitted) Such agreements are effective between the parties and those having notice."

The honest justice of this opinion is reflected in the Washington case of *Hill's Garage v. Rice,* 134 Wash. 101, 234 Pac .1023. In this case, the defendant had sold, by a bill of sale, certain garage tools and equipment to his sublessee, the plaintiff. After several transfers of interest by both the plaintiff and the defendant of their respective rights in the garage tools and the lease of the premises, the defendant attempted to declare that the garage tools and equipment had become fixtures and were thus part of the realty and were, therefore, his, even though he had previously sold this equipment to the plaintiff by a bill of sale and received from the plaintiff a chattel mortgage as security for the unpaid portion of the sales price. The Court states at page 105:

" * * * The defendant recognized all this property as personal property by selling it to the plaintiff as such; he further recognized it as personal property of the plaintiff when he took the chattel mortgage on it from the plaintiff; he further continued to recognize it as personal property by prosecuting his attempted foreclosure of that mortgage up to the final judgment; and finally he recognized it as personal property when he removed it, manifestly then claiming it as such; the property being at all times since prior to its sale by the defendant to the plaintiff situated and attached to the premises as at the time of its removal by the defendant. These facts, taken together with the very doubtful fixture character of the articles, which

> were but slightly attached to the premises and removable without injury to the premises, we think, call for the conclusion that the defendant cannot successfully invoke in support of his claim to the property the general rule applicable between a tenant and a landlord owner of the premises."

The above-cited cases are in agreement that a party cannot transfer items by a bill of sale or treat certain equipment as chattels by giving a chattel mortgage and then regain title to such items by declaring them to be "fixtures" subject to a real estate mortgage covering the land on which such equipment or items are located.

The title obtained by Nelse Mortensen & Co., Inc., to the property must stem either from (a) the title of the United States of America after entry under the decree of foreclosure, or (b) the title it obtained from the Seattle Association of Credit Men by reason of exercising its right of redemption. It is the contention of Nelse Mortensen & Co., Inc., as stated on page 14 of their brief, that:

> "Appellant, Nelse Mortensen & Co., Inc., acquired the same title that the United States of America would have acquired if no redemption of the property had been made."

Assuming, for the purpose of argument, that the Appellant's position, as stated above, is well taken, Nelse Mortensen & Co., Inc., would not have title to the machinery and equipment listed in the bill of sale from the United States Government to Puget Sound Products Co. The United States of America sold the machinery and equipment and real property by separate sales to the Puget Sound Products Co. It took back from the

Puget Sound Products Co. separate mortgages, one covering the real estate and one covering all the machinery and equipment. The United States of America, just prior to the commencing of its foreclosure action on the real property, accepted from Puget Sound Products Co. payment in full of the chattel mortgage. It is obvious that the United States, if it had acquired a Marshal's Deed, could not claim the machinery and equipment covered by the chattel mortgage as being fixtures and thus subject the real estate mortgage under the authorities cited herein and by the rules of simple justice.

## IV.

### The Property Claimed by Appellant Does Not Constitute Fixtures and Improvements and Is Not a Part of the Real Estate

As has been pointed out, the Appellant knew that the items claimed in this action were not subject to the real estate mortgage redemption right which Appellant purchased from the Seattle Association of Credit Men. Even if this were not true, however, the facts of this case disclose that the items claimed by the Appellant are not fixtures or improvements to the real estate and therefore cannot be subjected to the real estate mortgage as claimed by the Appellant.

The Appellant has cited a number of cases in its brief and has quoted certain favorable excerpts from them to support its position that these items are fixtures or improvements. The danger of quoting brief excerpts from cases dealing with the law of fixtures, and the fallacy of relying on such statements in a dif-

ferent factual situation, is succinctly stated by the Washington State Supreme Court in the case of *Strain v. Green,* 25 Wn.(2d) 692, 695, 172 P.(2d) 216, wherein the Court says:

> "We will not undertake to write a treatise on the law of fixtures. Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take. As early as 1899, the Court said, in *Philadelphia Mortgage & Trust Company v. Miller,* 20 Wash. 607, 56 Pac. 382, 72 Am. St. 138, 44 LRA 559:
>
> " 'There is a wilderness of authority on this question of fixtures * * * cases * * * are so conflicting that it would be profitless to undertake to review or harmonize them.' "

The case of *Filley v. Christopher,* 39 Wash. 22, 80 Pac. 834, cited by the Appellant on page 16 of its brief, is undoubtedly correct as to the criterion of a fixture being a united application of (1) actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. To maintain, however, that the case holds that specific items such as a furnace and boiler, or an electric switchboard, should be considered as fixtures and a part of the realty in this case at bar would be misleading. For example, in the above-cited case, the furnace and boiler in question were located in the basement of a theatre building resting on a foundation built

up through the floor, were encased in brick work, and could not be taken out or removed without tearing away the masonry. This is certainly not at all comparable to the portable heating system in the building involved in this case. Furnaces have often been declared to be chattels as opposed to fixtures and the Courts have, therefore, allowed them to be removed from the premises. Cf. *Becwar v. Bear,* 41 Wn.(2d) 37, 246 P.(2d) 1110; *Whitney v. Hahn,* 18 Wn.(2d) 198, 138 P.(2d) 669. These two cases both involved a furnace being declared a "trade fixture" and, therefore, not annexed to the realty. This conflict on furnaces is just one example which demonstrates the danger of attempting to classify an object as a "fixture" or as a "chattel" by quotation of authority without ascertaining the facts of the particular case.

The Appellant next discusses the "intention test" and on page 17 of its brief cites the case of *Cutler v. Keller,* 88 Wash. 334, 153 Pac. 15, to indicate that different presumptions of intention are established by different relationships such as landlord and tenant, vendor and vendee or mortgagor and mortgagee. Respondents agree that, in the absence of definitely ascertained intention, the Court is forced to rely on such presumptions as can be ascertained from the differing types of relationship between the parties. In the case at bar, however, there is no doubt as to the intention of Puget Sound Products Co. and the Government of the United States and all other parties with an interest in these items to treat them as personalty. It is not necessary, therefore, to engage in "presumptions" derived

from varying relationships to determine the intention of the parties. The validity of this position is demonstrated by the Appellant's own brief on pages 18 and 19. The Appellant quotes from the case of *Ballard v. Alaska Theatre Co.,* 93 Wash. 655, 161 Pac. 478, in part as follows:

> " * * * The intent is not to be gathered from testimony of the actual state of mind of the party making the annexation (*Washington Nat. Bank v. Smith,* 15 Wash. 160, 45 Pac. 736); but is to be inferred, *when not determined by an express agreement,* from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made." (Emphasis supplied)

In the above case, the Court allowed an organ to be removed even though it required a tearing out of part of the walls and partitions surrounding it and further allowed chairs which were bolted to the floor to be removed and the bolts to be clipped off flush with the concrete floor.

The cases of *Siegloch v. Iroquois Mining Co.,* 106 Wash. 632, 181 Pac. 51, and *Reeder v. Hudson Consolidated Mines Co.,* 118 Wash. 505, 203 Pac. 951, cited by the Appellant on pages 19 and 21 of his brief, are distinguishable on the ground that these cases involve the foreclosure of a real estate mortgage involving "improvements" to "mining property". Mining properties are of a special nature since there is nothing to distinguish mining property from the surrounding land except the machinery and development actually taking

place thereon. As the court says in *Siegloch v. Iroquois Mining Co., supra,* at page 636:

> "Turning to the evidence, we find nothing which the Court awarded the owners which cannot be said to be an improvement of the property. It must be borne in mind that this is mining property, having no value over and above the surrounding property unless the ores it contains can be extracted from it. To extract these ores profitably and successfully, machinery of the sort here in question is an essential. It is all attached to the realty; is fixed in place and permanent in the sense that it can remain so attached and fixed until destroyed by the elements or worn out by use. Plainly, we think, these articles are improvements of a permanent nature, which enhance the value of the realty for the uses for which it is intended."

The case of *King v. Title Trust Co.,* 111 Wash. 508, 191 Pac. 748, is cited by the Appellant on page 21 of its brief for the proposition that an elevator was established to be a fixture even though an agreement had been made between the owner and the seller of the elevator that it should remain personal property. It should be pointed out that the basic theory of the *King* case is that innocent third parties should not be prejudiced by secret agreements. The facts of the instant case amply demonstrate in this case that the Appellant was fully informed as to the agreements between the parties, and the Appellant is in direct privity with the Seattle Association of Credit Men and the United States Government, both of whom were parties to the original agreements establishing the machinery and equipment as personal property. The *King* case clearly

establishes the Court's desire to hold individuals to their agreements by the following statement at page 514:

> "On the other hand, if it were a controversy between the owner of the building and the elevator company as to whether or not the elevator plant is personal property as between them, we would as readily hold it to be personal property, since by their express agreement that title should remain in the elevator company until the purchase price was paid in full, they impliedly agree that, as between them, it should be regarded as personal property until paid for. *Boeringa v. Perry,* 96 Wash. 57, 164 Pac. 773.
>
> "We would also hold the elevator plant to be personal property, even as between the elevator company and appellants, if it were shown that the latter had knowledge of the agreement and understanding in that behalf made between the owner and the elevator company. *Allis-Chalmers Mfg. Co. v. Ellensburg,* 108 Wash. 533, 185 Pac. 811. * * * "

The cases of *Hall v. Dare,* 142 Wash. 222, 252 Pac. 926; *Nearhoff v. Rucker,* 156 Wash. 621, 287 Pac. 685, and *Strong v. Sunset Copper Co.,* 9 Wn.(2d) 214, 114 P.(2d) 526, are relied upon by the Appellant on pages 22-24 of its brief as indicating various possible degrees of annexation capable of establishing that an item is a fixture. As pointed out in previous sections of this brief, such items as chairs bolted to a concrete floor and a furnace enclosed in masonry have been declared to be chattels and subject to removal by the party claiming them as personalty. The cases cited by the plaintiff again indicate the danger of lifting from context quo-

tations of the court and using these to classify certain items as fixtures. For example, extremely heavy and ordinarily very permanent items have been declared to be personalty by the courts. In the case of *Bell v. Swalwell Land, L. & T. Co.,* 20 Wash. 602, 56 Pac. 401, a materialman was allowed to remove a three-story dwelling house from the realty which was claimed by the owner of the land who had been selling said land under a real estate contract to the materialman's employer. In the case of *Columbia Lmbr. Co. v. Bothell Dairy Farm,* 174 Wash. 662, a materialman lienor of a lessee was allowed to remove a golf club house from land being repossessed by a lessor even though the lease provided that all improvements should belong to the lessor upon termination of the lease either by forfeiture or expiration of the term. The case of *Westinghouse Company v. Hawthorne,* 21 Wn.(2d) 74, 150 F.(2d) 55, cited by the Appellant on page 26 of its brief, held that certain pushbuttons, switches and motors that were equipped with sliding rails were not to be considered as fixtures. These cases amply demonstrate that the mere size or manner of affixation of an object are not necessarily determinative of its nature as a fixture or a chattel.

The case of *Forman v. Columbia Theatre Co.,* 20 Wn.(2d) 685, 148 P.(2d) 951, is cited by the Appellant on pages 24 and 25 of its brief, for the purpose of establishing that conduits and wiring, switches, switch boxes, signs and other articles come within the term "improvements". This case is a very similar to the case at bar in that the lessor leased the real property to the

defendant and later executed a bill of sale for certain items of personalty within the theatre. *However, the successors in interest to the lessor were not attempting to claim items within the bill of sale* (as Appellant is attempting to do here) but instead conceded that the items listed on the bill of sale were personalty by agreement and should therefore be allowed to be removed from the realty. It is interesting to note that some of the items established as personalty by the said bill of sale in this case included an organ, 500 opera chairs, the fire protection system, stage and house draperies, and many other items. The specific items in dispute in the above-cited case were not listed in the bill of sale and the lessee (Columbia Theatre Company) was trying to include these additional items as personalty under the term "etc." contained in the bill of sale. The Court, of course, rejected this interpretation and stated that such objects should remain on the property as permanent improvements since the individuals would have included them in the bill of sale if they were to be treated as personalty. On page 691, the Court states very well the principle which we believe should be applied in the case at bar:

> "As to these items counsel has ably briefed the law of fixtures. However, we do not believe that law is applicable to the case at bar. Our conclusion is that the contract between the parties determines the ownership of the property in question and for that reason, the rights of the parties depend entirely on the proper interpretation of the instrument.
>
> "If the various leases had been silent as to the

ownership of the items in dispute, then the ownership would necessarily have to be determined upon whether or not there were fixtures and, if so, to whom they belonged—to the landlord or tenant. When, however, a landlord and tenant make a lease arrangement in which there are stipulations relative to the ownership of chattels which may be placed on the leased premises by the tenant, the agreement will be enforced regardless of what might be the rights of the parties at common law. In cases of that character the contract is the law made by the parties themselves which must determine their rights."

The case of *Westinghouse Company v. Hawthorne,* 21 Wn.(2d) 74, 150 P.(2d) 55, cited by the Appellant on page 26 of its brief, *does not* state that the items mentioned by plaintiff on page 26 such as engines with sliding rails, pulleys, switches, and pushbuttons, are to be considered fixtures under the facts of that case. For example, on page 82 the Court says:

"As this is the only testimony concerning the use of these pushbuttons, it must be held that the evidence did not show they were fixtures."

On page 83:

"Several of the motors furnished were equipped with sliding rails. The evidence does not show how these rails were used or installed. Upon the record it cannot be held that they ever became fixtures."

On page 84 the Court says:

"In the *Zimmerman case* [*Zimmerman v. Bosse,* 60 Wash. 556, 111 Pac. 796] it was held that engines, lathes, saws, edgers, planers, etc., were not fixtures, but remained personalty. In the case at bar there is no evidence that the motors used in

operating the machines were intended to be or had become fixtures. * * * ''

The case of *Strain v. Green,* 25 Wn.(2d) 692, 172 P.(2d) 216, is cited by the Appellant to establish the proposition that the ''secret intention'' of the parties annexing the item is not in any way determinative of whether the item is a chattel or a fixture. The Respondents do not deny this principle but maintain that the record is amply clear that the intention of the parties as to these items being personalty has been maintained from the beginning of negotiations between Puget Sound Products Co. and the United States Government Agencies.

The case of *Theodore A. Kochs Co.* (C.C.A. 7, 1941) 120 F.(2d) 603, cited by the Appellant on page 28 of its brief, is not in point regarding the question of machinery becoming a part of the realty and passing under a real estate mortgage since in that case the annexor owned both the plant and the machinery at the time of installation and continued to own and operate same at the time the mortgage was given to the mortgagee, whereas in the case at bar the original owner (the United States Government) specifically classified the machinery and equipment as personal property by calling for separate bids, by executing a quit claim deed of the real property separate from the conveyance of the personal property, and by taking back separate mortgages on each. The Court *in re Theodore A. Kochs Co., supra,* specifically recognizes the right to separate machinery from realty in regard to mortgages as can be seen from the Court's comments on page 606:

> "The mortgagor of industrial property has it within his means to exclude any portion of his property from the operation of the mortgage. In the instant case the owner of the factory might have limited the scope of the mortgage to the factory stripped of its machinery, but instead it provided expressly that the mortgage was to cover the realty and the fixtures. Certainly the terms of the mortgage are consistent with the conclusion reached in the preceding paragraph and, under the circumstances, if the mortgagor had intended the machinery not to share the legal fortunes of the realty, it should have stated as such. It is too plain for words that (1) the law treats the disputed items of property as fixtures and that (2) the property fits the legal description of the mortgage."

Thus, it can be seen that, under the law of fixtures, the items claimed by the Appellant are not fixtures or improvements. The two large overhead cranes are not in any way attached to the building but are self-contained units that run on overhead tracks. The transformers claimed by Nelse Mortensen & Co., Inc., are housed in a cement vault merely set on the floor therein. The auxiliary fire pump, compressor and Trumbull switchboard, the portable oil heater, and the boiler, have not been physically affixed to the realty.

## V.

### The Agreement and Consideration Connected with the Use of the Premises by Appellee Has Been Established

The Referee found that Nelse Mortensen & Co., Inc., was to have the use of such equipment of the Puget Sound Products Co. as it might desire, in return for which the Puget Sound Products Co. was to have free storage for its equipment at the premises.

Prior to acquiring the real property, the premises were examined by responsible officers of applicant who entered into an agreement with Mr. Worth C. Goss representing the Debtor in Possession, under which the latter agreed to assist Nelse Mortensen & Co., Inc., to obtain title to the real estate, to furnish free power to Nelse Mortensen & Co., Inc., and to allow said company the use of certain machinery and equipment on the premises. In return for this, the debtor in possession was to have the right of occupancy of the premises for the storage of its machinery and equipment.

The Seattle Association of Credit Men gave its co-operation to this arrangement, in connection with the sale of the equity of redemption to the Appellant, since the plan was of substantial benefit to the Association and the creditors which it represented.

The agreements clearly indicate that Nelse Mortensen & Co., Inc., agreed to the use of the premises by the Appellee in consideration for the use of Appellee's equipment, and therefore the claim of Nelse Mortensen & Co., Inc., for rental should be denied.

## CONCLUSION

All of the property items, except heater and boiler, were covered by agreements between the United States and Puget Sound Products Co. and for that reason constitutes personal property which belongs to the Debtor in Possession, Puget Sound Products Co.

The heater and boiler were placed on the premises after the Puget Sound Products Co. executed its real estate mortgage. By agreement with the United States Government, the property so placed on the premises was not to be included under the terms of the real estate mortgage. Furthermore, Puget Sound Products Co. has at all times classified these items as personal property, as evidenced by outstanding chattel mortgages executed by said company.

Under the law, the items claimed by the Appellant are personal property. The items are not attached so as to be permanent parts of the building. The items have not been appropriated to a particular use, since Appellee's business is completely different from the business for which the equipment was originally appropriated. Finally and most important, the intention of the United States Government agencies, Puget Sound Products Co. and the Seattle Association of Credit Men, which is binding upon Nelse Mortensen & Co., Inc., by reason of both constructive and actual notice, has always been to treat the items as personal property.

The facts of the case and the finding of the Referee conclusively establish that there was an agreement between Nelse Mortensen & Co., Inc., Seattle Association

of Credit Men, and Puget Sound Products Co., that the latter company could use the premises without charge in exchange for Nelse Mortensen & Co., Inc., receiving Seattle Association of Credit Men's equity of redemption and the use of the Puget Sound Products Co.'s equipment.

For these reasons the decision of the lower court should be affirmed in all respects.

Respectfully submitted,

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No. 13862

# United States Court of Appeals

## For the Ninth Circuit

NELSE MORTENSEN & CO., INC., *Appellant,*

— vs. —

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## APPELLANT'S REPLY BRIEF

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# United States Court of Appeals

## For the Ninth Circuit

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| NELSE MORTENSON & CO., INC., *Appellant*, vs. KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees*. | No. 13862 |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## APPELLANT'S REPLY BRIEF

### REPLY TO ARGUMENT OF APPELLEES

The argument of appellees in their brief is based entirely upon the false premise that by agreement between the United States (acting through the War Assets Administration, or the Reconstruction Finance Corporation) the fixtures which are claimed by appellant had been severed from the real estate and converted into personal property.

What are the facts as they appear from the record?

The building upon the property involved was constructed by the Defense Plant Corporation for use as a "steel fabricating plant" (Tr. 208), in which equipment and machinery was installed by the owner of the property for the purpose of making the building

suitable and convenient for use as a fabricating or manufacturing plant.

In the early case of *Voorhis v. Freeman*, 2 Watts & S., 116, 37 Am. Dec. 490, it was said by the Supreme Court of Pennsylvania:

> "* * * Nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury to the building. * * * Whether fast or loose, therefore, *all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold.*" (Itacis ours)

In addition to the Washington cases which are cited in the Brief of Appellant, the following are a few of the cases from other jurisdictions in which this principle is discussed and followed:

*Commonwealth Trust Co. v. Harkins* (Penn.) 167 Alt. 278;

*Detroit Trust Co. v. Detroit City Service* (Mich.) 247 N.W. 76;

*Gray v. Prudential Ins. Co.* (Okla.) 77 P. (2d) 563;

*Danville Holding Corp. v. Clement* (Va.) 16 S.E.(2d) 345;

*Metropolitan Life Ins. Co. v. Kimball* (Ore.) 94 P.(2d) 1101;

*In re Taylor & Dean Mfg. Co.*, 136 F.(2d) 370;

*Automatic Sprinkler Corp. of America v. Marston* (N.H.) 54 Atl.(2d) 154;

*First National Bank v. Nativi* (Vt.) 49 Atl.(2d) 760.

The sale of the property to Puget Sound Products Company was initiated by an offer set out in the "Invitation for Bids" which appears on pages 149 to 151, inclusive, of the Transcript of Record in this case, as Trustee's Exhibit No. 7. Therein, the War Assets Administration solicited bids "for the purchase or lease of certain surplus *real property facilities* hereinafter described," and the particular property referred to was designated as follows:

"Location and Description

"The real property offered for sale or lease is that portion of the Lake Washington Shipyards, owned in fee by the Government, located at Houghton, Washington, two (2) miles south of Kirkland, Washington, on the east shore of Lake Washington, and is *suitable for shipbuilding, ship repair, ship moorage, steel fabrication, manufacturing or various other small marine industries.*

"There are approximately 280,000 square feet of property with adjoining shore lands upon which there is a *building and improvements, hereinafter described.* (Note: All descriptions subject to final survey.)

"General Description of Facilities

"Land: Approximately 400′ x 700′ with adjoining shore land.

"Building: Steel fabricating building, 87′ by 300′, ceiling height 41′, mill type, heavy wood construction, concrete pier foundation, corru-

gated steel siding, composition roof. Building constructed in 1940.

"Craneways: Two craneways, 34′ x 490′.

"Shipways: Two and one-half shipways.

"Equipment: 1 — 45-ton Whirley Crane; 1—7½-ton Bridge Crane; 1—15-ton Bridge Crane; 1—10-ton Bridge Crane; 1—350-ton Joggling Press; 2—Acetylene Generators; 1—Auxiliary Fire Pump; 1—Worthington Air Compressor; 114—Bending and Welding Slabs with stools; 6—Jib Cranes; 1—Trumbull Switchboard; 13—Transformers; 3—200 KVA, 5—100 KVA, 3—50 KVA, 2—75 KVA."

It is apparent that what the United States was offering for sale or lease was not merely the land and the bare frame of a building thereon, but a complete manufacturing plant, including the machinery and equipment therein. As was said in the case of *Danville Holding Corp. v. Clement, supra*:

"The general course of modern decisions in American courts no longer follows the old common law doctrine that the mode of annexation, slight and temporary, or immovable and permanent, is the single criterion for determining the character of chattels as fixtures. Today, emphasis is placed upon the nature of the article and upon the uses and purposes for which it is held or employed. The method of the annexation to the realty receives slight consideration and then only as a circumstance from which the intention of the annexor may be deduced.

"This later rule is due to great advances in the science of mechanical engineering, bringing on great changes in industrial conditions, and creating a situation in the manufactories in which *a*

*building is only one of the incidents or accessories of a manufacturing plant* considered as a unit.

* * * * * * * * * *

"* * * The machinery was essential for the conduct of the character of business which Walters said he intended to establish. It was placed in the building to carry out the very purpose for which the building was acquired, adapted, occupied and used. Its very nature, its cost, manner of annexation to the building, and the purpose to which it was devoted, all negative any idea of a temporary venture."

After a draft of the proposed promissory notes and mortgages had been prepared by the War Assets Administration and submitted to the Puget Sound Products Company, the attorney for the company wrote a letter to the War Assets Administration (Ex. 19, Tr. 256 to 259) requesting that the documents be modified so that they would not include *after-acquired property*. The portion of the proposed real estate mortgage which he requested be deleted (so far as material here) consisted of the following:

"In addition to the real property hereinabove described, this indenture also covers and includes all other property of like nature to that hereinbefore described which may hereafter be acquired by the Mortgagor *for use in the plant conveyed.*"

It is significant that no objection whatever was made to the inclusion in the real estate mortgage of the "building, structures and improvements" located on the property; and it is also significant that the property offered and conveyed, and subsequently mortgaged, is referred to as a "plant" suitable for "ship-

building, ship repair, ship mooring, steel fabrication, manufacturing or other small marine industries."

Certainly nothing in the negotiations and transactions between the parties could be interpreted or construed as an agreement "fixing the status of the machinery and equipment as personalty." If that had been the intention, the attorney for Puget Sound Products Company, who was carefully editing the promissory notes and mortgages, would certainly have requested that not only the "after-acquired" property, but also the "improvements" then located on the premises, be excluded from the provisions of the real estate mortgage.

As was said in the case of *First National Bank v. Nativi* (Vt.) 49 Atl.(2d) 760, *supra*:

> "It is now well recognized that as between mortgagor and mortgagee, where a building is specially adapted to certain uses, machinery attached thereto that is essential to the purpose to which the building is devoted and is intended for permanent use therein becomes a fixture regardless of the manner of its annexation. [Citing cases.]"

When the mortgage from the Puget Sound Products Company upon the real estate and improvements was foreclosed, and the property sold to the United States at Marshal's sale, the United States acquired title to all of the fixtures and improvements located in the building on the premises and installed therein to make the property suitable and convenient for the purposes for which the property was used, namely, a manufacturing and fabricating plant. Surely the wiring, trans-

formers, switchboard, cranes and equipment could not have been removed from the building by the mortgagor after the sale, leaving the United States, as purchaser at the foreclosure sale, with nothing but a bare building. What it purchased was a manufacturing plant.

Appellees suggest in their brief that the fact that appellant purchased from the Seattle Association of Credit Men the right to redeem the property from the Marshal's sale might have some bearing upon the question as to whether the fixtures and improvements were to be considered as personal property or as part of the real estate. We submit that such is not the case. The Seattle Association of Credit Men held a second mortgage upon the real estate, and its interest in the real estate (including the fixtures and improvements thereon) had been foreclosed. The only right left to it, so far as the real estate was concerned, was a right to redeem from the Marshal's sale, which would have required the payment of a large amount of money. When even this right (of questionable value) was about to expire, it sold the right of redemption to appellant for $750.00. If the property had not been redeemed, the United States would have acquired, by the Marshal's deed, the land and the improvements and fixtures located thereon, as a complete manufacturing plant, and that is exactly what the appellant acquired when it redeemed the property and received the Marshal's deed. By the assignment to appellant of its right of redemption, the Seattle Association of Credit Men sold something that had no value to it, and received therefor a substantial consideration. Whether

or not the property was redeemed, all right of the Seattle Association of Credit Men to the real estate and the fixtures and improvements had been extinguished by the foreclosure action.

It is true that a chattel mortgage (Tr. 159 to 163) was executed by the Puget Sound Products Company to the United States, to secure a certain promissory note for $32,678.40, covering the fixtures and equipment located in the building; and if the United States had seen fit to foreclosure the chattel mortgage and sell the fixtures and equipment covered thereby, there would have been a severance of the fixtures and equipment from the real estate. This chattel mortgage, however had been paid in full, and the possibility of any foreclosure or severance had been eliminated. Upon the release of the chattel mortgage, the fixtures and equipment covered thereby retained their status as improvements to the real estate and were subject to the mortgage upon the real estate which was foreclosed by the United States. *Parrish v. Southwestern Washington Production Credit Assn.*, 41 Wn.(2d) 586, 250 P.(2d) 973.

We have searched the record vainly for any "agreement" fixing the status of the fixtures and improvements as personal property, and no such agreement can be found. If there had been such an agreement, the real estate mortgage would have excluded the structures and improvements therefrom, but, instead, they were expressly included therein. The alleged agreement is merely "wishful thinking" on the part of the appellees, and has no basis in fact.

We wish to apologize to the court for the inadvertent misstatement on page 26 of the opening brief, as to the holding of the Supreme Court in the case of *Westinghouse Co. v. Hawthorne*, 21 Wn.(2d) 74, 150 P.(2d) 55. This error is pointed out on page 28 of the Brief of Appellees. That was an action to foreclose a materialman's lien, and the court said that in order to render real property subject to foreclosure for such a lien, it must appear that the articles alleged to be lienable have become fixtures. The items held not to be fixtures were articles being used on boats in the process of manufacture, and articles and motors used on portable machinery moved from one place to another for temporary use. However, the court did hold that the wiring and accessories constituted fixtures, and stated:

> "Appellant furnished a large quantity of wiring and material essential to the placing, maintenance, and use thereof. This wire, whether unprotected or in conduits or otherwise covered, was attached to the building, and was, of course, in the open, the building being of single construction. Manifestly, wiring for electrical power and light is an essential part of a plant such as here in question. The wiring must be attached in some way to the building, hence to the realty, and the fact that the building may be of single construction is immaterial.
>
> "The evidence supports appellant's claim of lien for the wiring, accessories, and appliances used in connection therewith."

We respectfully submit that the appellant in this case acquired by the Marshal's deed the complete

manufacturing plant covered by the Puget Sound Products Company's mortgage; that the mortgagor has no right to the fixtures and improvements claimed by appellant, and that the Trustee likewise has no right, title or interest therein. The fixtures and improvements, as well as the land and the building thereon, belong to appellant.

Respectfully submitted,

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No. 13862

# United States Court of Appeals

## For the Ninth Circuit

NELSE MORTENSEN & CO., INC., *Appellant,*

— VS. —

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## PETITION FOR REHEARING

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# United States Court of Appeals
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| NELSE MORTENSON & CO., INC., *Appellant*, vs. KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees*. | No. 13862 |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellant respectfully petitions this court for rehearing of the above entitled cause, and for reversal or modification of the decision filed herein on September 20, 1954, for the reasons hereinafter set out.

The rule is correctly stated in the opinion of the court that the intention of the owner *at the time of attachment* of fixtures to real estate that they shall become a part thereof is given effect in the State of Washington.

What was the intention of the owner in the case at bar?

During 1941 or 1942 the building designed and in-

tended to be used as a "steel fabricating plant" was constructed upon the real estate by the owner. In the building, at the time of original construction, certain electrical wiring, switches, transformers, and switchboard for turning the electric power on and off, and the plumbing, pipes, cranes, fire protection system, and other improvements were installed. Certainly, personal property was used in the construction of the building, but when it was completed all of this personal property—not only the boards, nails, steel and concrete, but also the wiring, pipes, transformers, switchboard, cranes, and fire protection system—became an integral part of the building and improvements. For a period of more than six years this building, and the fixtures and improvements located therein, was used by the owner as a manufacturing plant, without material change or modification.

There surely can be no doubt whatever but that the entire plant was intended by the owner, *at the time of construction*, to be a single integrated plant and permanent improvement, and that all of the component parts thereof, including the electric wiring, switchboard, transformers, pipes and plumbing, and other improvements were a part of the real estate.

Starting, then, with the proposition that the fixtures in question were an integral part of the real estate between 1941 and December 16, 1947, when it was sold to the Puget Sound Products Company, we come to the question of *whether there was a severance* of such fixtures from the real estate. *This question is the sole question here involved*, yet it was treated in a very summary manner in the decision of the court. The

decision is based entirely upon the finding by the referee, adopted by the court, that "it was the intention of the government to segregate this equipment and treat it as personalty." None of the fixtures claimed by appellant have been physically severed from the real estate, even to this date, and if they are severed the property acquired by appellant will be converted from a building suitable for use as a factory to a bare frame of a building without even the facilities for lighting the same or using electric power therein.

To support the *conclusion* of the referee that it was the intention of the government to treat the fixtures claimed by appellant as personalty, the opinion of the court (as well as the Findings of Fact of the referee) refers to the quitclaim deed executed by the United States (Ex. 3, Tr. 83-86), and the mortgages from the Puget Sound Products Co. to the United States (Ex. 9, Tr. 159-162). It is upon these documents, and these alone, that the conclusion that there was a severance of the fixtures from the real estate is based. The opinion of this court contains the following assertions:

> (1) "The instrument of quitclaim given by the United States to Puget Sound in consummating the sale divided the property into the parcel of realty with the improvements, by which the buildings and other structures passed as appurtenances, and further expressly conveyed the 'equipment' as personalty."
>
> (2) "The taking back of the real mortgage and the chattel mortgage on these separate properties respectively, precluded the United States from thereafter claiming as to Puget Sound that the

described personalty was an integral part of the realty."

The first of the foregoing assertions is based solely upon the wording of the quitclaim deed therein referred to, in that, after the description of the real estate, there was a provision for the conveyance of "personal property, machinery and equipment" (Tr. 84) which is particularly described, and which includes most of the items involved herein. Assuming that the official of the War Assets Administration who executed this instrument would have had the power to bind the United States by an *express* declaration of the severance of the fixtures from the real estate (which seems to us to be extremely doubtful), the quitclaim deed does not state, either directly or by implication, that the "equipment" therein referred to is, or shall thereafter be, personal property. On the contrary, the conjunctive "and" used to separate the terms "personal property" and "equipment" directly negatives any idea that it was intended to declare that the equipment therein described was personal property. In truth and in fact, most of the items of property therein described were not personal property, but were equipment which had been permanently affixed to the real estate years before and were fixtures and a part of the real estate. The quitclaim deed nowhere states that they are personal property nor that they are conveyed as such.

The second assertion, that the taking back of chattel mortgage on the machinery and equipment precluded the United States from thereafter claiming that the property therein described was an integral part of

the realty, is answered by the very recent decision of the Supreme Court of the State of Washington, *Parrish v. Southwestern Washington Production Credit Assn.*, 41 Wn.(2d) 586, 250 P.(2d) 973.

Notwithstanding the fact that this case was cited in both the opening and reply briefs of appellant, and discussed at length in the oral argument, no reference to the case, nor to the rule of law set out therein, is made in the decision of the court, except the statement that:

> "The law is that if personal property securely attached to the realty is made subject to a chattel mortgage which is thereafter paid off, the ordinary rule controls and in the absence of other circumstances the article is treated as a part thereof."

The *Parrish* case involved the question as to whether pumps, pipes, attachments, transformers and other property installed and used in connection with a cranberry bog were fixtures or personal property as between the holders of a real estate mortgage and of a chattel mortgage thereon. *The holder of the real estate mortgage herself* had executed, or joined in the execution of, several chattel mortgages upon the identical property in dispute, before the mortgage on the real estate had been given. If the mere *acceptance* of a chattel mortgage on fixtures, as in the case at bar, is to be held to constitute a declaration that the fixtures shall thereafter be personal property, then certainly the *giving* of a chattel mortgage on similar fixtures, as in the *Parrish* case, would be a much stronger declaration to that effect. Those chattel mortgages were

formally signed and acknowledged by the mortgagors, and it was their act, and not the act of the mortgagee, which declared the property to be personal property. Notwithstanding this, the Washington Supreme Court expressly held that the property covered by the chattel mortgages became personal property only insofar as the chattel mortgages themselves were concerned, and that "upon satisfaction of the chattel mortgages, the machinery and equipment involved lost their status as chattels and resumed their original status as fixtures annexed to the land." Even though the holder of the real estate mortgage in that case was one of the former owners of the property, and had executed chattel mortgages on the identical fixtures, and in favor of the same mortgagee, it was held that her real estate mortgage covered the fixtures even as against subsequent chattel mortgages thereon, given to the same mortgagee by the then owner of the property.

The case at bar can not be logically distinguished from the *Parrish* case. The chattel mortgage in favor of the United States was given and accepted as security for the payment of a promissory note, and this note had been paid in full and the mortgage released. The potential severance of the fixtures by reason of the chattel mortgage thereon was terminated, and "the machinery and equipment lost their status as fixtures and resumed their original status as fixtures annexed to the land."

The referee, the District Court, and the United States Court of Appeals, are bound by the decisions of the Supreme Court of the State of Washington as to the substantive law applicable to this case, and in

accordance with the rule stated in the *Parrish* case must hold that there was no severance of the fixtures from the real estate by reason of the acceptance of the chattel mortgage thereon.

Nor, we submit, is there anything inconsistent in the United States accepting a chattel mortgage on the fixtures and equipment, and at the same time accepting a real estate mortgage covering the real estate and the same fixtures appurtenant thereto. Both instruments are given and accepted only as security for the payment of indebtedness, and there is no reason why two mortgages covering, in part, the same property, may not be given. Certainly, the phrase "together with the buildings, structures and improvements located thereon" is susceptible of no other interpretation than that the fixtures which have been made a part of the real estate are covered by the mortgage; and even if this phrase were not used, the description of the real estate alone would be sufficient to include the fixtures.

The effect of the decision in this case would be to permit respondents to remove from the property of appellant all of the equipment with which the building is heated, and furnished with light and power, and all of the facilities installed when the building was constructed for the purpose of making it suitable for a factory, and to convert the building into a bare skeleton. This equipment, much of which would be of little value to respondents, is of great value to appellant, because without it the building is practically useless.

If a creditor of Puget Sound Products Co. had caused the fixtures covered by the chattel mortgage to be sold

at Sheriff's sale, and the purchaser had paid the ballance owing on the chattel mortgage, and had attempted to remove from the building all of the fixtures and equipment, leaving the United States with only the land and a bare frame of a building, without lights, heat or electricity, and with no equipment therein, as security for the payment of its mortgage on the real estate, we are sure that not only the United States but also Puget Sound would have protested loudly (and rightly) that most of the equipment covered by the chattel mortgage constituted fixtures, and that the real estate mortgage was prior to any claim of the purchaser.

Likewise, if Puget Sound, itself, after payment of the note secured by the chattel mortgage, had sold or removed from the building the fixtures and equipment therein, leaving only the bare skeleton of a frame building as security for payment of the real estate mortgage, the United States, rightly and properly, would have protested that the fixtures and equipment were subject to its mortgage on the real estate, and that the fixtures could not be removed or disposed of without its consent.

The fact that, after the mortgages on the property had been given to the United States, the Puget Sound Products Co. executed chattel mortgages on the fixtures to other persons is entirely immaterial in this case. These mortgages were subsequent and inferior to both the real estate mortgage and the chattel mortgage in favor of the United States, insofar as the fixtures included therein are concerned.

We respectfully submit that the property acquired by the appellant through the foreclosure of the real estate mortgage included not only the land and buildings, but also the *wiring*, *transformers*, switchboard and other fixtures and permanent improvements placed upon and attached to the property at the time of the original construction of the manufacturing plant thereon many years ago, as well as the heating system, boiler and pipes installed subsequent to the time the property was acquired by the Puget Sound Products Co., and that this petition for rehearing should be granted, and the decision of the court modified or reversed, for the reasons herein set out.

Respectfully submitted,

LYCETTE, DIAMOND & SYLVESTER,
By: JOSEF DIAMOND,
HERMAN HOWE,
*Of Counsel.*
*Attorneys for Appellant.*

## CERTIFICATE OF COUNSEL

We, ~~Joseph~~ Joseph Diamond and Herman Howe, counsel for appellant, do hereby certify that in our judgment the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

Joseph Diamond

Herman Howe

# No. 13,863

IN THE

# United States Court of Appeals

## For the Ninth Circuit

JOAO SIMOES BARREIRO,

*Appellant,*

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

*Appellee.*

## BRIEF OF APPELLEE.


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No. 13,863

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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JOAO SIMOES BARREIRO,

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*Appellee.*

---

## BRIEF OF APPELLEE.

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### STATEMENT OF THE FACTS.

Appellant is a native and citizen of Portugal who last entered the United States on April 22, 1930 at the port of Jersey City, New Jersey as a stowaway. He has remained in the United States since that time. He registered for Selective Service on October 16, 1940 and on May 9, 1941 was classified IV-E. He was reclassified I-A in September, 1942. He was married September 12, 1942. The appellant was arrested in deportation proceedings and deportation hearings were held on January 10, 1944, January 31, 1944, April 3, 1944 and April 5, 1944. During the course of the deportation hearings it was developed that the

appellant had on April 8, 1943 filed with his Local Selective Service Board form DSS 301, in which form he sought exemption from military service as a neutral alien. He had the form prepared by a notary public, read it and signed it. He was thereafter reclassified IV-C. When questioned on this point during the deportation hearing it was found that he sought exemption as a neutral alien after his employers had unsuccessfully sought his deferment and he had submitted a marriage certificate to his draft board only to be informed that he would not be deferred as a married man because his marriage had occurred within the past few months. On June 30, 1944 the presiding inspector of the Immigration and Naturalization Service prepared his proposed order, finding that the appellant ought *not* be granted suspension of deportation. Thereafter the Board of Immigration Appeals ordered the case reopened for the purpose of giving appellant an opportunity to present to Selective Service his request that his application for exemption from military service be withdrawn. Reopened hearing was held on July 11, 1945, at which time it was developed that the appellant had on April 27, 1945 written to his draft board declaring his desire to withdraw his claim of exemption from Selective Service. He was advised that the Form DSS 301 could not be withdrawn from the Selective Service files and "the effect of DSS form 301 being on file is a matter for the Courts to determine." The presiding inspector then found the appellant ineligible for suspension of deportation on the

ground that he was an alien ineligible to citizenship in that he had claimed exemption from military service as a neutral alien. The proceedings were again reopened in 1949 and the presiding officer reaffirmed the previous decision.

Appellant filed this action under Title 28 U.S.C. 2201 against the Attorney General of the United States for a declaratory judgment declaring him to be eligible for suspension of deportation and eligible for United States citizenship. The Court below found that the appellant was ineligible for citizenship and ineligible for suspension of deportation.

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## STATUTES AND REGULATIONS INVOLVED.

### LAW.

54 *Stat.* 885 (1940) as amended (50 *U.S.C.* App. par. 303(a) 1946):

"Except as otherwise provided in the Act * * * every male citizen of the United States and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a netural country shall be relieved from liability for training and service under this Act * * * if, prior to his induction into the land or naval forces he has made application to be relieved from such liability in the manner prescribed by the President, *but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States.*" (Italics supplied.)

8 *U.S.C.* 155:

"In the case of an alien * * * who was deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * * * * (2) suspend deportation of such alien if *he is not ineligible for naturalization,* or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * * *"

SELECTIVE SERVICE REGULATIONS
(7 Fed. Reg. 855)

Para. 611.12. "When a *nondeclarant alien* is residing in the United States. Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of Para. 611.13, is 'a male person residing in the United States' within the meaning of Section 2 and Section 3 of the Selective Training and Service Act of 1940, as amended."

---

**APPELLANT'S SPECIFICATION OF ERRORS.**

1. That the evidence in said action was and is insufficient to justify the findings of fact and conclusions of law heretofore made by the said District Court.

2. That the evidence in said action was and is insufficient to justify or support the judgment entered in said action in and by the said District Court;

3. That the findings of fact and conclusions of law made by the said District Court are insufficient to support and do not support the said judgment;

4. That the said District Court committed error and violated the provisions of Rule 52(a) of the Federal Rules of Civil Procedure in that the said District Court failed and refused to especially find or make any findings whatsoever upon the allegations set forth in paragraphs II, III, IV, V, VI, VII and VIII of plaintiff's complaint on file in the above-entitled action.

5. That the said District Court erred in denying the motion of plaintiff for a new trial in the above-entitled cause.

6. That said District Court erred in denying the motion of plaintiff to amend, change, alter and substitute findings.

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## ARGUMENT.

The government admits that the appellant would be eligible for suspension of deportation if he were eligible for citizenship. Therefore, the sole issue in this case is appellant's eligibility for citizenship as attested by his execution of Form DSS 301.

Although appellant specifies six errors of the Court below he raises only two main questions in his argu-

ment. First, that the appellant had a right to withdraw his claim of exemption from military service; second, that the judgment must be reversed because the Court below failed to find on all the material allegations.

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## I.

### THE RIGHT OF APPELLANT TO WITHDRAW HIS CLAIM OF EXEMPTION.

The first issue raised by appellant is the right to withdraw a claim of exemption from military service from the file of the Selective Service Board. The record discloses that appellant after failing to obtain deferment, first by reason of his employment, and then by reason of marriage, filed the Form DSS 301. (Tr. 75.) Appellant, in the District Court, contended that his filing of the form DSS 301 was on the advice of his Draft Board and that therefore he should have been excused from the effect of filing the form. As the appellant does not advance this contention before this Court it is assumed to have been abandoned.

There was no merit to this contention. During the deportation hearing on January 10, 1944 the appellant testified (Tr. 44):

> "A. I asked for that classification because I am a neutral alien. At the time I registered I was not married and they put me in 4-C, then after I got married they classified me as 1-A and then at my own request they put me back in 4-C. I wish to state that when the war started I quit my business and tried to enlist in the United

States Navy and they didn't take me because I was an alien. Then I tried the Coast Guard also, but they wouldn't take me. I tried to go to Brazil as an interpreter for the United States government but they turned me down because I was an alien. After that I tried to secure employment at Pacific Bridge Company and they wouldn't take me because I was an alien. Then I went to work at the Bethlehem Shipyard for one day and when they checked up with the San Francisco office I had to leave because they would not continue my employment because I was an alien. Since then I own my own apartment house and home and have a wife and one child and that is the reason I wanted to be exempted from the draft."

On April 3, 1944, he testified (Tr. 63-64):

"Q. When were you classified in class I-A?

A. In September, 1942, the first time. After that my employers, the Atlas Imperial Diesel Engine Company tried to have my case deferred but they would not (18) do so and continued to put me in I-A, then my company appealed the decision and I was placed in I-A on appeal.

(Note: Presents 3 classification cards issued to him, Order No. 1875. The first one is dated September 14, 1942, classified I-A; the second is dated January 28, 1943, classified I-A by Local Board; the 3rd card, dated March 22, 1943, shows that the classification I-A has been affirmed by the Board of Appeal by a vote of 3-0. These 3 cards were returned.)

Q. When were you reclassified the last time in IV-C?

A. June 10, 1943.

Q. In what manner did you secure your classification in IV-C on June 10, 1943?

A. By filing a DSS Form 301, application of an alien for relief from United States military service.

Q. Did you fill that form out yourself before you signed it?

A. Mr. Reeves, a real estate man on Fruitvale Avenue, near 14th Street, Oakland, a notary public, filled it out for me and I signed it.

Q. Did you read over this DSS form 301 before you signed it?

A. Yes.

Q. At the time you filled out this form and signed it were you already married?

A. Yes.

Q. For what reason did you ask for deferment classification IV-C when as a married man you could apply for classification as a married man?

A. I tried to do that, but I was told I would be considered as a single man because I had just been married a few months."

(Tr. 65-66):

"Q. Do you wish to become a citizen of the United States?

A. If it is possible, yes. At the time I filed that form 301 I was illegally in the United States and figured I couldn't become a citizen anyway. I figured I am Portuguese and would have to remain with my country as long as I am a Portuguese citizen.

Q. You have been living continuously in this country for nearly 14 years and you have been

earning a good living here. Do you feel that you owe anything to this country?

A. Yes, sir.

Q. Then why did you not stand by your responsibilities and if called into the United States Army serve in it without applying for reclassification as an alien?

A. Because I am not sure how long I am going to stay here, if I stay or not, on account of being illegally in this country. I respect all the United States laws. If I don't like any laws of the United States I should go out of this country voluntarily. I live here because I like the United States laws.

Q. If you were required to do so would you bear arms for the United States, either in this country or any other place?

A. Yes, if I am a permanent resident of this country and I want to be a citizen before I serve in the United States Army. Of course if I get a permanent residence so that I can get citizenship in two months.

Q. Have you any objection to serving in the United States Army?

A. I don't like the Army. I tried to go in the Navy or Coast Guard or Merchant Marine when I was single. Right now I don't want to, anywhere; I want to stay here with my family, if it is possible. If it is not possible I will go."

It is clear from the appellant's own testimony that he knew the nature of the form he was signing and fully realized the consequences of claiming exemption as a neutral alien.

Appellant now contends that because he attempted to *withdraw* the form DSS 301, he is not barred from citizenship. The record contains a letter (Pl. Ex. 2, Tr. 129) from the Selective Service Board by which the appellant was informed that the form DSS 301 could not be withdrawn and that "the effect of the DSS 301 form being on file is a matter for the Courts to determine."

The leading cases on the effect of filing Form DSS 301 are cited by appellant. *Moser v. United States,* 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729; *Machado v. McGrath,* 193 F. 2d 706.

However, they fail to support his contention in the case at bar. In the *Moser* case, a Swiss national believed he was exempt from military service by reason of a treaty between his country and the United States. Upon advice of the Swiss Legation he filed a form DSS 301 which had been revised. He relied upon the advice of his legation that he would not thereby lose his citizenship.

In the *Machado* case, the alien filed DSS 301 under the belief that he was claiming exemption as a non-resident rather than as a neutral alien. It was also shown that the alien lacked an understanding of the English language. The Court stated in the *Machado* case:

> "As in the *Moser* case, we believe Machado was entitled to have the 'opportunity to make an intelligent election' *between being subject to the draft on the one hand and being exempt but*

> *losing a right to become a citizen on the other.* See: *Johnson v. United States*, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 701. The sound reason for affording such an opportunity arises in good part from our conviction that American citizenship being a most precious right, its denial should not be allowed to rest upon a doubtful premise."

Both cases stand for the principle that the alien involved must have an opportunity to elect "between being subject to the draft on the one hand, and being exempt but losing a right to become a citizen on the other."

The appellant in this action did have "an opportunity to elect" and did elect to "being exempt * * * a citizen." He had the assistance of a notary public in preparing DSS 301, he had demonstrated throughout the deportation and Court proceedings that he understands the English language. He states that he read form DSS 301 before he signed it, and his statement that "I couldn't become a citizen anyway" shows clearly that he knew that by signing the form he would become ineligible to citizenship.

In the *Machado* case, supra, a similar attempt was made to withdraw the claim of exemption and the same reply was received from the draft board as appellant herein received. However, the effect of the attempt to withdraw was not an issue in that case.

There have been a number of naturalization petitions filed in the District Court by persons who had

filed form DSS 301 and later attempted to withdraw it.

*In re Martinez,* 73 F. Supp. 101;
*In re Molo,* 107 F. Supp. 137;
*Petition of Perez,* 81 F. Supp. 591.

In all these cases it was held that the petitioner was ineligible for citizenship.

Appellant herein claimed the advantage of Form DSS 301 on April 8, 1943 and thereafter successfully avoided military service for the duration of World War II. His attempt to accomplish the same result by job deferment and then by marriage had been unsuccessful. It was not until April 27, 1943 that he wrote to the draft board seeking to withdraw the DSS 301. Obviously it could not be withdrawn as it was the basis of his reclassification to IV-C in 1943 and the continuance of said classification thereafter. It is interesting to note that the attempt to withdraw the DSS 301 was not contemplated until it was suggested as a possible way to circumvent deportation.

Appellant became ineligible for citizenship when he voluntarily filed DSS 301 and he was thereby ineligible for suspension of deportation (8 *U.S.C.* 155).

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## II.

### THE FINDINGS ARE SUFFICIENT TO SUPPORT THE ULTIMATE CONCLUSION OF THE COURT.

Appellant contends that findings should have been made upon each of the allegations contained in the

complaint. He cites a number of California decisions. This contention is not deemed to be of sufficient merit to warrant serious consideration. Rule 52(a) of the Federal Rules of Civil Procedure does not require the Court to make findings on all the facts presented or make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the Court they are sufficient.

*Carr v. Yokohama Specie Bank,* 200 F. 2d 251, 255 (C.A. 9);

*Norwich Union Ind. v. Hass,* 179 F. 2d 827, 832 (C.A. 7);

8 *Fed. Rules Dec.* 271.

It is respectfully submitted that the judgment of the lower Court is fully supported by the evidence and the law and should be affirmed.

Dated, San Francisco, California,
October 16, 1953.

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MILTON T. SIMMONS,
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# No. 13,863

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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JOAO SIMOES BARREIRO,

*Appellant,*

vs.

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*Appellee.*

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## REPLY BRIEF FOR APPELLANT.

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*Appellee.*

---

## REPLY BRIEF FOR APPELLANT.

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The so-called statement of the facts set forth in the brief of appellee is wholly insufficient and inaccurate. We respectfully commend to the consideration of this Honorable Court the statement of the evidence set forth in appellant's opening brief, pages 2-29, particularly those portions thereof which deal with appellant's futile attempts to withdraw his claim of exemption, and his equally futile, though earnest and repeated attempts to enlist in the armed forces of the United States. All of these matters are established without conflict by the record, and we shall turn, therefore, to certain misstatements, which we assume are wholly inadvertent, by the learned counsel for the Government.

## I.

### "APPELLANT HAS NEVER ABANDONED HIS CONTENTION THAT HE CLAIMED EXEMPTION AS A NEUTRAL ALIEN ON THE ADVICE OF HIS DRAFT BOARD."

It is quite obvious that the Government is now receding from, if not entirely retracting, its prior contention that a claim of exemption once made is wholly irrevocable and cannot be recalled, and that once it is signed, the alien, in the language of Catullus, has gone down the long road from which there is no returning.

We shall see presently that the law gives no sanction to such a contention, but permits one who has been ill-advised, or who has executed a document by reason of mistake, fraud, or undue influence, to rescind the instrument and secure its cancellation.

That this view cannot be sustained we shall show presently with citation of authorities which are both numerous and well considered.

In the brief of counsel for appellee it is stated at page 6:

> "Appellant, in the District Court, contended that his filing of the form DSS 301 was on the advice of his Draft Board and that therefore he should have been excused from the effect of filing the form. As the appellant does not advance this contention before this Court it is assumed to have been abandoned."

Nothing could be farther from the truth. The matter was argued at great length in proceedings both before the Immigration and Naturalization Service

of the U. S. Department of Justice, and in the prior proceedings before this Court on habeas corpus. (No. 27563H.) In that proceeding, Judge Harris of this Court remanded the cause for further hearing before the Immigration and Naturalization Service. That body, as appears from the record, merely adhered to its first decision without passing upon certain important questions that had been raised in the interim and overruling every point raised by the appellant by mere *ipse dixit*. That we have raised in this Court the question which the Government contends we did not raise will be apparent from a few brief references to the opening brief of the appellant.

Thus we find that the point is raised at page 5 of appellant's opening brief, in which we said:

> "The sole ground upon which the Government insists upon tearing plaintiff from his wife and children and giving them the terrible alternative of expatriating themselves and following him into exile, or bidding him an eternal farewell, is that plaintiff, after he had vainly endeavored to enlist in the Armed Forces of the United States, acted on the improvident advice of his local draft board during the second World War and claimed exemption from military service as a neutral alien.
>
> "This claim he endeavored to withdraw.
>
> "As long ago as March 28, 1945 the Department of Justice ruled that he might withdraw his claim for exemption and stayed the order of deportation to permit him to do so.
>
> "He promptly withdrew 'unqualifiedly and unreservedly' the claim of exemption. (T.R. 128.)

"Again acting under advice of his local board, he volunteered for induction and service in the Armed Forces of the United States, again withdrawing any and all claim of exemption from military service. (T.R. 130.)

"It is now the arbitrary, and, we submit, the inhuman contention of the Department of Justice that a claim of exemption, once made, no matter in what circumstances or under what conditions, —is irrevocable, and cannot be withdrawn.

"The department has thus reversed its own former ruling. It has affronted not only the fundamental principles of equity which grant relief against mistakes of both law and fact, but the law of humanity as well. The trial judge has upheld this ignoble and reprehensible conduct of the department." (Appellant's Opening Brief, p. 5.)

We raised the point again when we cited the well-considered decision of the Supreme Court in *Moser v. U. S.*, 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729. For our comment upon this case see appellant's opening brief, p. 36. In the said brief we stated at page 37:

"Plaintiff is clearly entitled to relief from the consequences of the claim improvidently signed in reliance upon the advice of his draft board, without being advised as to the legal consequence of the claim that he would be thereafter barred from citizenship."

## II.

### THE APPELLANT DID NOT ELECT TO WAIVE HIS RIGHT TO BECOME A CITIZEN WHEN HE SIGNED A CLAIM OF EXEMPTION UNDER THE ADVICE OF HIS DRAFT BOARD.

At page 11 of the Government's brief, it is stated:

> "The appellant in this action did have 'an opportunity to elect' and did elect to 'being exempt as a citizen.' He had the assistance of a notary public in preparing DSS 301."

Of what value, we ask, is the advice of a notary public on a matter of law?

Lawyers and judges disagree as to the construction and effect of the statute.

What right has a notary to give advice as to the effect of a document, and its consequences to the claimant?

But that is not all. There is no evidence in the record that the notary ever advised appellant that by claiming exemption, he became debarred from American citizenship.

---

## III.

### THE GOVERNMENT HAS ATTEMPTED NO ANSWER TO THE DECISIONS CITED IN APPELLANT'S OPENING BRIEF.

It has been the contention of the immigration authorities from the beginning that the appellant had no right to withdraw his claim of exemption; that having once made it his action was irrevocable and that he could never thereafter claim the right to suspen-

sion of his deportation under the Dies Act. In other words, the Immigration Service contends that there are no principles of equity embodied in the law relating to citizenship, deportation and naturalization.

We submit that this is an affront to the most elementary principles of equity jurisprudence.

We need not, however, go back to the Chancery reports for authorities. We cited them in our opening brief.

*Moser v. U. S.,* 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729;

*Machado v. McGrath,* 193 Fed. (2d) 706;

*Fong Haw Tan v. Phelan,* 333 U.S. 6, 68 S. Ct. 374, 92 L. Ed. 433.

In appellant's opening brief pages 33 to 36, we showed, with citation of authorities, that this action for declaratory relief being a suit in equity is governed by equitable principle, and that the Court has the full power to grant relief on the ground of mistake of fact, and even, in proper conditions, against a mistake of law. Recent decisions of the Supreme Court of the United States adhere to this rule.

Where, as here, a mistake of law was induced and shared by one to whom the mistaken party would normally look for guidance as to the law, the Courts will grant relief.

*Staten Island Storage Co. v. United States,* 85 Fed. (2d) 68;

*Dowd v. United States,* 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215;

*Ackerman v. United States,* 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207.

Even in cases in which a purely statutory right, such as the taking of an appeal from a judgment within a particular time, is involved, the Courts will grant relief where the failure to appeal has been due to the act of the adverse party. Thus in *Dowd v. United States, supra,* an inmate of a penitentiary undergoing a life sentence was prevented from taking an appeal because the prison authorities had placed a ban on sending papers out of the prison. Even though the right of appeal is purely a statutory right, the Supreme Court of the United States unanimously held that the defendant was entitled to relief, and the high Court remanded the cause with direction to the District Court to allow the state a reasonable time in which to afford the prisoner the full appellate review he would have received but for the suppression of his papers, failing in which he should be discharged. In our opening brief we cited the case of *Moser v. United States,* 341 U.S. 41, 71 S. Ct. 553, 95 L. Ed. 729, in which it was held that an alien who applied for exemption from military service was not disbarred from becoming an American citizen where his application did not contain a waiver of his rights of citizenship, and which he signed on the advice of the legation of his own country. We quoted the pertinent language of this case at page 36 of appellant's opening brief, and on page 37, the language of *Machado v. McGrath,* 193 Fed. (2d) 706.

All that the Government has to offer to offset these decisions of the Supreme Court of the United States and the Court of Appeals are *In re Martinez,* 73 F. Supp. 101; *In re Molo,* 107 F. Supp. 137; *Petition of Perez,* 81 F. Supp. 591—all decisions of *nisi prius* courts, which are not binding upon any other judge, even in the district in which they were rendered.

In *Klapprott v. United States,* 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266, the Supreme Court of the United States set aside a judgment by default in a proceeding to revoke a certificate of naturalization on the ground that the person naturalized had falsely sworn allegiance to the United States.

While the factual situation in these cases may be differentiated in some particulars from those of the case at bar, the principle pronounced in all of the decisions is the same. The decision in the *Klapprott* case was unanimous, though five different opinions were written in which the justices expressed their individual views. The opinion of Justice Rutledge, with whom Justice Murphy concurred, will bear quotation:

> "To treat a denaturalization proceeding, whether procedurally or otherwise, as if it were nothing more than a suit for damages for breach of contract or one to recover over-time pay ignores, in my view, every consideration of justice and of reality concerning the substance of the suit and what is at stake.
>
> "To take away a man's citizenship deprives him of a right no less precious than life or lib-

> erty, indeed of one which today includes those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power."

Counsel for the Government attempt to distinguish the *Moser* case from the case at bar by asserting that *Moser* acted upon the advice of the Swiss legation and was misled by the legation's misapprehension of the law.

We submit that the case of Barreiro is even stronger than that of Moser. Barreiro acted, not on the advice of a foreign legation, but upon that of his own draft board, which presumably knew the law, and knew that there was a statute which rendered an alien who claimed exemption from military service ineligible thereafter to become a citizen. Once more we reiterate our insistence that Barreiro was misled into filling out the form claiming exemption as a neutral alien on the advice of his draft board.

We further call attention to the fact, which we set forth at page 22 of appellant's opening brief, and which the United States attorney makes absolutely no attempt to answer or refute,—that the appeal board of the Department of Justice itself deferred the deportation of appellant *"for the purpose of giving him an opportunity to withdraw his application for exemption from the draft."*

The order further proceeds:

> "In the event form 301 is withdrawn the case is to be reopened *to permit him to show that he no longer claims exemption from military service on account of alienage.*"

At page 23 of appellant's opening brief, we set forth the communications addressed by the petitioner to the Department of Justice and to his local selective board, *"unqualifiedly and unreservedly"* withdrawing the claim of exemption.

Having done this, how can it now be claimed by the Government that the withdrawal of the claim was ineffectual?

---

## IV.

### THE FAILURE OF THE DISTRICT COURT TO MAKE FINDINGS ON THE MATERIAL ISSUES IN THE CASE.

The findings of fact and conclusions of law made by the District Court are set forth at page 27 of appellant's opening brief.

In arguing that the judgment must be reversed for the failure of the District Court to make findings on the material issues and for the error of the Court in denying appellant's motion to amend, change, alter, and substitute findings, we showed that the trial judge made no finding as to the allegations of the complaint set forth at page 10 of appellant's opening brief. There is likewise no finding on the allegation

of the complaint as to the numerous and futile efforts of appellant to enlist in the various branches of the armed forces, nor is there any finding upon the allegations that the deportation of appellant would result in serious economic detriment to his wife and children, all of whom are citizens of the United States.

We submit that the appellant was entitled to specific findings upon each of these material allegations; but the trial judge did not even make a general finding as to any of them.

In appellant's opening brief, commencing at page 39, we cited numerous decisions to the effect that the failure to find upon a material issue renders the decision against law, for which a new trial must be granted. Citation of further decisions to this point is unnecessary. The rules take care of the question:

> "In all actions tried upon the facts without a jury, or with an advisory jury, *the Court shall find the facts specially* and state separately its conclusions of law thereon, and direct the entry of the appropriate judgment."
>
> *Federal Rules of Civil Procedure,* Rule 52(a).

---

## CONCLUSION.

It is submitted that the brief of appellee, like the findings of the Court, fails to answer, or even to mention, the all-important issues in the case. The Supreme Court of the United States has set its face intransigently against the unjust and inhumane atti-

tude of the Government. It is respectfully submitted, therefore, that the judgment appealed from should be reversed, and the cause remanded to the District Court with directions to grant appellant the relief prayed for in his complaint.

Dated, San Francisco, California,
November 2, 1953.

JOSEPH A. BROWN,
*Attorney for Appellant.*

# No. 13,863

IN THE

# United States Court of Appeals

## For the Ninth Circuit

---

JOAO SIMOES BARREIRO,
*Appellant,*

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,
*Appellee.*

---

## APPELLANT'S PETITION FOR A REHEARING BY THE COURT EN BANC (OR IF A REHEARING BE DENIED, FOR A STAY OF THE MANDATE).

---

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No. 13,863

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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|---|---|
| JOAO SIMOES BARREIRO, | *Appellant,* |
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| HERBERT BROWNELL, JR., Attorney General of the United States, | *Appellee.* |

## APPELLANT'S PETITION FOR A REHEARING BY THE COURT EN BANC (OR IF A REHEARING BE DENIED, FOR A STAY OF THE MANDATE).

---

*To the Honorable Clifton Matthews, the Honorable Homer T. Bone, and the Honorable Richard H. Chambers, United States Circuit Judges:*

The appellant in the above entitled cause respectfully petitions Your Honors for a rehearing before the entire Court, deeming that the question involved upon this appeal is of such importance as to warrant a hearing *en banc.*

The grounds upon which appellant submits that a rehearing should be granted are as follows:

## I.

**SINCE THIS COURT HAS MODIFIED THE JUDGMENT OF THE DISTRICT COURT AND HAS AFFIRMED IT UPON THE SOLE GROUND OF THE FAILURE OF THE COMPLAINT TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, THE ALLEGATIONS OF THE COMPLAINT MUST BE TREATED AS TRUE.**

The gist of the decision of Your Honors is set forth in Division II of the opinion written by His Honor, Judge Matthews. The language of that portion of the opinion is as follows:

> "No alien was eligible for suspension of deportation under Sec. 155(c) unless he was eligible for naturalization or was ineligible for naturalization solely by reason of his race. It did not appear from the complaint that appellant was eligible for naturalization or was ineligible for naturalization solely by reason of his race. Instead, it appeared from the complaint that on June 10, 1943, appellant applied to be, and was, relieved from liability for training and service under the Selective Training and Service Act of 1940, as amended, and was thereby debarred from becoming a citizen of the United States. Thus it appeared from the complaint that appellant was ineligible for naturalization, not by reason of his race, but by reason of the application above mentioned, and was therefore ineligible for suspension of deportation."

In the last paragraph but one of the opinion it is stated: "We conclude that the complaint failed to state a claim upon which relief could be granted."

Since Your Honors have modified the judgment of the District Court so as to dismiss the action for

such alleged failure, we submit that the decision of this Court must stand or fall upon the sufficiency of the complaint. In other words, if the complaint is good as against a motion to dismiss upon the grounds stated, which is the equivalent of a general demurrer under the old practice, the judgment of this Court cannot stand.

We submit that the complaint states sufficient grounds for relief in the form of a declaratory judgment.

---

## II.

### THE SUFFICIENCY OF THE COMPLAINT FOR DECLARATORY RELIEF.

An action for declaratory relief is obviously for the purpose of obtaining a declaration of the rights of the parties; the present action is not brought for the purpose of **compelling** the Attorney General to suspend deportation, but merely for the purpose of obtaining a judgment that the plaintiff is eligible for such suspension,—that he is proper subject for the exercise of the power conferred upon the Attorney General by the Dies Act in the exercise of his discretion. In such an action it is unnecessary to set forth evidentiary matters; it is enough to plead facts showing that an **actual controversy exists.** (*Tolle v. Struve,* 124 C.A. 263, 12 Pac. (2d) 61; *Northwestern Casualty Co. v. Legge,* 91 C.A. (2d) 19, 204 Pac. (2d) 106; *Andrews v. W. K. Co.,* 35 C.A. (2d) 41, 94 Pac. (2d)

604; *Maguire v. Hibernia Savings and Loan Society,* 23 Cal. (2d) 719, 146 Pac. (2d) 673, 151 A.L.R. 1062.)

It may be said in passing that practically from the beginning of the deportation proceedings against plaintiff, more than eleven years ago, the Immigration Department has taken the position that petitioner was a person of good moral character, that his deportation would result in serious economic detriment to his wife and children, all of whom are citizens of the United States, but that the claim of exemption from military service, once made, no matter in what circumstances or under what conditions, is irrevocable and cannot be withdrawn. The ultimate purpose of this action was to obtain a judgment that, since appellant's claim of exemption was filed under the advice of his local board, after he had repeatedly and without success attempted to enlist in the Armed Forces of the United States, being rejected each time upon the sole ground that he was an alien, he had a right to withdraw the claim of exemption, based as it was upon the improvident advice given to him "by the highest authority to which he could turn." (*Moser v. United States,* 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729.)

This observation is sufficient to dispose of the last paragraph of Part I of the opinion, and also of Part III.

## III.

**THE OPINION OF THIS COURT HAS FAILED TO PASS UPON IMPORTANT QUESTIONS RAISED IN APPELLANT'S OPENING BRIEF.**

These may be summarized as follows:

**(a) This Court has failed to even mention the admitted fact that appellant attempted to withdraw his claim for exemption.**

In appellant's opening brief, commencing at page 22, we set forth *in haec verba* the order of May 28, 1945, made by the Department of Justice, in which appellant's application for suspension of deportation was ordered deferred for sixty days for the purpose of giving appellant an "opportunity to **withdraw his application for exemption** from the draft."

We further set forth the letter addressed by plaintiff to the Immigration and Naturalization Service of the Department of Justice and to his local Selective Service Board on April 27, 1945, withdrawing his claim of exemption. Further set forth is a communication from appellant's local board, dated April 28, 1945, acknowledging receipt of the letter last referred to and concluding with the direction, "If it is still your desire to apply for voluntary induction, please return the two copies of D.S.S. Form 165 which were given to you at the time you were last in the office."

We repeat that Your Honors, at least so far as appears from the opinion, have wholly failed to take into consideration the appellant's withdrawal of his claim of exemption.

**(b) The attempts of appellant to enlist in the armed forces of the United States are likewise ignored in the opinion.**

These are set forth *in extenso* in appellant's opening brief and are enumerated in his complaint. (Appellant's Opening Brief, p. 10 et seq.)

From these allegations of the complaint which, as we have heretofore stated, must be taken as true for present purposes, it appears that plaintiff, prior to the improvident filing of the claim of exemption, had endeavored to enlist in the United States Navy and that he subsequently endeavored to enlist in every branch of the service. He was rejected in some cases upon the ground that he was an alien and in others on account of his age. It is likewise alleged in the complaint (Appellant's Opening Brief, p. 10), which must also be taken as true, that plaintiff did not knowingly or wilfully claim exemption from service in the Armed Forces, and that he requested the classification solely because he was erroneously and improvidently advised so to do.

This fact is utterly ignored in the opinion of Your Honors.

## IV.

**THE OPINION OF THIS COURT FAILS TO FOLLOW THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES WHICH HOLD THAT A CLAIM OF EXEMPTION IMPROVIDENTLY MADE MAY BE WITHDRAWN.**

In arguing this matter in Appellant's Opening Brief (pp. 30-39), we contended that the Court below, in the exercise of its equity powers, had the right to relieve the plaintiff from a mistake of either law or fact in conformity with established equitable principles. (*Houston v. Northern Pacific R. R. Co.,* 231 U.S. 181, 34 S.Ct. 113, 58 L.Ed. 176; *Winget v. Rockwood,* 69 Fed. (2d) 326.)

We showed further, with citation of authorities, that appellant could not justly be debarred from pressing his application for suspension of deportation by reason of his improvident claim, which he was induced to file by his own draft board. To say that he could not be relieved against the consequences of this claim for any reason whatsoever, is, we submit, the pronouncement of a rule contrary to the immemorial principles of equity jurisprudence.

> **"Nothing less than an intelligent waiver is required by elementary fairness."** (*Moser v. United States,* supra.)

In that behalf we also cited *Fong Haw Tan v. Phelan,* 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433; *Delgadilla v. Carmichael,* 332 U.S. 338, 68 S.Ct. 10, 92 L.Ed. 17.

We submit that this Honorable Court has not only applied to the statute the letter that killeth rather

than the spirit that giveth life, but that the opinion is clearly contra to the rule pronounced by the Supreme Court of the United States.

It is noteworthy that this Honorable Court has not only refrained from all mention of the numerous decisions cited by appellant, but that not a single decision of any Court, *nisi prius* or appellate, is cited anywhere in the opinion.

We submit that the injustice and cruelty of a statutory interpretation which drives the husband and father of an American wife and American children into exile in a foreign land should not be upheld unless the precise terms of the statute clearly require it. "Deportation can be the equivalent of banishment or exile."

* * * * * * *

"The stakes are indeed high and momentous for an alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent upon circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized." (*Delgadilla v. Carmichael,* supra.)

As is well said in *Michado v. McGrath,* 183 Fed. (2d) 706, Barreiro "was entitled to have the 'opportunity to make an intelligent selection' between being subject to the draft on the one hand, and being exempt but losing a right to become a citizen on the other." We submit that the high authority of these decisions has been wholly ignored and disregarded by Your Honors.

## CONCLUSION.

Wherefore the appellant respectfully prays Your Honors for an order granting a rehearing of this cause in which the stakes for him are so high, before the entire Court, pursuant to the provisions of Rule 23 of this Court; or, in the event that a rehearing be denied, for an order staying the mandate of this Court for a reasonable time to enable appellant to apply to the Supreme Court of the United States for a writ of *certiorari* to review the judgment of this Court.

Dated, San Francisco, California,
September 20, 1954.

JOSEPH A. BROWN,
*Attorney for Appellant and Petitioner.*

## Certificate of Counsel

I hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

Dated, San Francisco, California,
September 20, 1954.

Joseph A. Brown,
*Attorney for Appellant and Petitioner.*

No. 13,865

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

RENE BUSSOZ,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---


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No. 13,865

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

RENE BUSSOZ,

*Appellee.*

---

## APPELLANT'S OPENING BRIEF.

---

### I.

### Jurisdictional Statement.

(a) The United States District Court for the Southern District of California had jurisdiction by virtue of 8 U. S. C. 701 (Jurisdiction to Naturalization), and the matter came before the Court on the Motion of the United States of America for an Order denying the Petition of Rene Bussoz, a citizen of France, for naturalization [Tr. 5].

(b) This Court has jurisdiction by virtue of 28 U. S. C. 1291 (Final Decisions of District Courts).

## II.

## Statement of Case.

This is an appeal from a Judgment of the United States District Court for the Southern District of California, ordering the petitioner Rene Bussoz, appellee herein, admitted to citizenship [Tr. 23] over the objections of the United States of America, through the Immigration and Naturalization Service, based on the ground that appellee was debarred from becoming a citizen of the United States by virtue of the provisions of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 303(a)), in that he applied for exemption from military service during World War II as an alien of a neutral country [Tr. 5].[1]

## III.

## Statutes Involved.

Section 3(a) of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885 (50 U. S. C. App. 303(a)), provides:

> "Sec. 3(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. Provided, that any citizen or

---

[1]Another objection was made on the ground that appellee "had failed to establish good moral character during the period required by law." The appellant does not challenge the Trial Court's finding in favor of the appellee on this issue.

subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: * * *."

Section 10 of the Selective Training and Service Act of 1940, 54 Stat. 893 (50 U. S. C. App. 310), provides in part:

"(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act; * * *

(3) to appoint by and with the advice and consent of the Senate, * * *, a Director of Selective Service who shall be directly responsible to him * * * to carry out the provisions of this Act;

* * * * * * * *

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act * * *."

Title 32, Code of Federal Regulations (Cumulative Supplement), Regulation 603.1, page 9095, provides in part:

"§603.1 Director of Selective Service. The Director of Selective Service is responsible directly to the President. He is hereby charged with the administration of the selective service law and is hereby authorized and directed:

(a) To prescribe such amendments to the regulations in this part as he shall deem necessary.

(b) To issue such public notices, orders, and instructions as shall be necessary to the efficient administration of the selective service law.

* * * * * * * *

(e) To perform such other duties as shall be required of him under the selective service law. * * *"

Title 32, Code of Federal Regulations (Cumulative Supplement), Part 601, page 9092, provides in pertinent part as follows:

"PART 601—DEFINITIONS.

* * * * * * * *

§601.1 Definitions to govern. The definitions contained in this part shall govern in the interpretation of the Selective Service Regulations.

§601.2 Aliens. (a) The term 'alien' means any person who is not a national of the United States.

* * * * * * * *

(c) The term 'citizen or subject of a neutral country' is used to designate an alien who is a citizen or subject of a country which is neither a cobelligerent country nor an enemy country. * * *"

## IV.

## Statement of Facts.

Appellee, a 48-year-old native and national of France and a former resident of Paris, has resided in the United States since his lawful admission into this country for permanent residence on December 6, 1939 [Tr. 3]. On May 8, 1940, he filed his declaration of intention to become a citizen of the United States [Tr. 108]. During World War II, he registered for Selective Service but he

desired to avoid military service and discussed the possibility of such avoidance with his Local Board officials who informed him that France was then a neutral country [Tr. 44-46, 96, 118].

On April 5, 1943, appellee filed with the Local Board an application for relief from military service (D. S. S. Form 301) [Tr. 107] in which he stated he was a citizen of France "which is neutral in the present war." Said application further provided:

> "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States" [Tr. 108].

At the same time, appellee filed an "Alien's Personal History and Statement" (D. S. S. Form 304) [Tr. 110] in which under question No. 41 he stated:

> "I do object to service in the land or naval forces of the United States [Tr. 113]; see attached Affidavit."

The Affidavit [Tr. 117] states in effect that if appellee entered the service and were captured, he would not be treated as a prisoner of war but would be considered a guerrilla "and be shot forthwith" and that if the enemy learned of his becoming a member of the United States Armed Forces, they would seek vengeance against his family residing in France [Tr. 118, 119].

At the time of filing his application for exemption, appellee surrendered his copy of declaration to become a citizen which he had previously executed on May 8, 1940 [Tr. 97] and on April 12, 1943, appellee was granted relief

from training and service under the Selective Training and Service Act of 1940, in accordance with his application as a citizen of a country neutral in the war, and he was reclassified by Local Board No. 15 from Class I-A to Class IV-C [Tr. 98].

On October 24, 1944, appellee was reclassified as being "over age for military service" [Tr. 99].

Appellee filed his Petition for Naturalization on September 20, 1949 [Tr. 3, 4], and the United States moved for an Order denying the Petition for Naturalization [Tr. 5].

The lower Court, after hearing the Motion and considering the evidence concluded that on April 5, 1943, France was not a neutral country, and as a consequence the statute that would render appellee ineligible for naturalization did not apply to him [Tr. 16, 21]. The Court thereupon denied the Motion of the United States and ordered appellee admitted to citizenship [Tr. 23].

## V.

## Questions Presented by Appeal.

(a) Whether the determination by the National Director of Selective Service that France was, for a period from 1942 to 1943, a neutral state for the purpose of exemption from military service under Section 3(a) of the Selective Service Act is binding on the courts so as to preclude naturalization of an alien who secured exemption on the basis of such ruling.

(b) Whether the appellee is estopped from now repudiating his prior deliberate act in filing application with the Local Board for relief from military service (D. S. S. Form 301) as a result of which he has enjoyed well calculated benefits.

## VI.

## ARGUMENT.

### A. Recognition of Foreign Governments or of Belligerency in Case of Insurgency Are Strictly Political Matters Within the Prerogative of the Executive Alone or in Cooperation With Congress, and Not Subject to Judicial Review.

The determination in time of war of who are and who are not neutral nations in dealings of external nature of an international character is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the courts.

*United States v. Curtis Wright Corporation,* 299 U. S. 304, 319;

*Oetjen v. Central Leather Company,* 246 U. S. 297, 302;

*Jones v. United States,* 137 U. S. 202, 212.

The courts merely take judicial notice of the action of the Executive in such matters, which are binding on all agencies, citizens and subjects of the United States.

*United States v. Belmont, et al.,* 301 U. S. 324, 330;

*Oetjen v. Central Leather Company, supra.*

It is based on the fact that the Constitution has committed the conduct of our foreign relations to the political departments of the government.

*United States v. Curtis Wright Corporation, supra;*

*Oetjen v. Central Leather Company, supra.*

Customarily, the Department of State is the agency through which the President acts in his role as our constitutional representative in foreign affairs. Consequently, if the ruling with respect to the neutrality status of France on April 12, 1943, had been made by the State Department, there would be no doubt that the courts would be bound by such determination. But for the purpose of carrying out the provisions of the Selective Training and Service Act of 1940, the President, under congressional authority (50 U. S. C. App. 310(b)) delegated to the Director of Selective Service all the authority (except the power to conscript industry) vested in him under the Act, including the making of rules and regulations for determining the status of registrants seeking exemption from service as neutral aliens under Section 3(a) of the Act. Necessarily included in this delegation was the executive authority to determine the war status of the foreign states whose nationals had registered under the Act.

*Cf., Dingman v. United States,* 156 F. 2d 148, 150 (C. A. 9), *cert. den.* 329 U. S. 730;

*Roodenko v. United States,* 147 F. 2d 752 (C. A. 10), *cert. den.* 324 U. S. 860.

It seems, therefore, that the Selective Service Director's determination during World War II, especially if made with the collaboration and advice of the State Department, that a foreign state was a neutral in that war [see appellant's (defendant's) Exs. G, H, I, J], was as much a political act of the Executive and as binding on the courts as if it were made by the State Department itself.

## B. Was France a Neutral Within the Terms of the Regulation?

As will appear in this brief under the heading Statutes Involved, *supra,* the Director of Selective Service issued Regulation No. 601.2 defining the term, for the purpose of the Act, "citizen of a neutral country" as being used to designate an alien who is a citizen or subject of a country which is neither a cobelligerent country nor an enemy country.

The questions then are: Was this a reasonable regulation? And did France at the time fit this definition?

To state the proposition more broadly, it is the appellant's contention that even if the determination of neutrality is reviewable, the District Court was not warranted in overruling the determination made by the Director. The concept of neutrality for the purposes of the Selective Service Law was not necessarily the same as for other purposes and in other contexts. For example, the regulation by the Director of Selective Service that aliens who have resided in this country more than three months shall be deemed resident aliens unless they apply for determination of status has been upheld as applied to an alien admitted as a business visitor against the claim that in many other aspects he was not deemed a resident.

> *Mannerfrid v. United States,* 200 F. 2d 730 (C. A. 2), *cert. den.* March 7, 1953.

The same rule should be applied to the situation here presented. The determination that in the peculiar situation of France in 1942 and 1943, it was a neutral for the pur-

poses of Selective Service was not unreasonable, and should therefore not be disregarded by the courts to confer benefits upon an alien who knowingly waived such benefits.

The Court in its findings of fact No. 9 [Tr. 19] states in part in quoting from the Encyclopedia Britannica:

> "On June 22, 1940, France surrendered, and on July 10 (after armistice was signed with Germany and Italy) France became a totalitarian state, with Petain as chef d'etat."

Is it unreasonable then after France's surrender for the Director of Selective Service to apply the definition of Regulation 601.2(c) that France which had surrendered was not a "co-belligerent"? And surely France was not by any definition considered "an enemy country." If then, France was neither a co-belligerent nor an enemy country, it fits the definition of the regulation though for other purposes and other concepts of neutrality France may not have been considered a "neutral" in the usual sense. Thus, as was stated in *United States v. Obermeier,* 186 F. 2d 243 at page 247 by the Court of Appeals for the Second Circuit:

> "We start with these doctrines:
>
> 1. A Regulation is presumptively valid and one who attacks it has the burden of showing its invalidity.
>
> 2. A Regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute."

As stated by Judge Goddard in the United States District Court for the Southern District of New York in *In re Molo,* 107 Fed. Supp. 137 (June 3, 1952), at page 139:

> "It is evident that Congress did not intend to restrict 'neutral' to its narrowest definition. To have

done so would have caused an insuperable burden on the Selective Service system to weigh carefully every action by a 'neutral' nation to determine when it superseded the bounds of impartiality or when it returned thereto and to analyze the day by day position of each nation. A definite standard was essential for the efficient operation of the Selective Service System. Congress clearly did not intend to hamper the procurement of manpower in those critical times with such uncertainties. Such a conclusion is quite unlikely.

The Director of Selective Service adopted the Regulation which for the purposes of the Act, drew a clear-cut line and provided for the efficient and speedy administration of the Act. It clearly protected the right of 'neutrals.' The Regulation was plainly a fair and reasonable one and consistent with the Act. * * *"

With regard to France, the Director of Selective Service acted with the aid and advice of the State Department as will be seen by reference to Appellant's (Defendant's) Exhibits D through J, recognizing that "Free France" which was fighting was within the definition of the Regulation a co-belligerent, while the France that had surrendered was certainly not an "enemy country," neither was it "a co-belligerent country."

The purpose of the legislation was for, as Judge Goddard says, the protection of the rights of "neutrals" and appellee availed himself of that protection when it was to his best interest to do so.

### C. Should the Appellee Be Estopped Now From Repudiating His Prior Deliberate Acts as a Result of Which He Had Enjoyed Well Calculated Benefits?

The facts in the instant case are remarkably parallel to the case of *In re Molo, supra.* There, the petitioner signed D. S. S. Form 301 on July 21, 1943. The appellee signed the form on April 2. 1943. In the *Molo* case, petitioner there wrote a letter on November 21, 1944, requesting rescission of his D. S. S. Form 301. Here, the appellee wrote his letter on November 6, 1944. As stated by Judge Goddard at page 140 of the *Molo* case:

> "The petitioner's sincerity and motives are suspect in writing the letter of November 21, 1944, requesting rescission of his Form D. S. S. 301 which he had signed on June 21, 1943. It was written nine months after he had been classified IV-F and when he was over thirty-eight years old and thus no longer liable to be inducted. See Petition of Perez, D. C. 81 F. Supp. 591; In re Martinez, D. C. 73 F. Supp. 101 at page 102."

It will be noted that the appellee wrote his letter on November 6, 1944 *after* he was reclassified as being "over age for military service" on October 24, 1944.

On the facts, there might be extenuating circumstances which may encourage a sympathetic decision in appellee's favor. But at the same time, it seems highly inconceivable that, having voluntarily asserted under oath in his D. S. S. Form 301 that he was a citizen of France, "which is neutral in the present war," and having acquiesced in his

treatment as a neutral alien and thereby received the desired benefits, appellee should years later be allowed to disclaim the status given him.

The debarment from citizenship is a serious deprivation, but it was the inevitable consequence, as appellee well understood, of his voluntary choice to accept exemption from military service.

His hope that his claim to exemption would not lead him to debarment was his own; no responsible official gave him any assurance that the consequence of debarment could be avoided.[2]

The penalty of debarment imposed by the statute is clear and unequivocal, and the Court may not amend its provisions,

> "by inserting or adding a provision to the effect, that where there are extenuating circumstances, the Naturalization Court may ignore the plain provisions of the law"
>
> *Petition of Fatoullah,* 76 Fed. Supp. 499-500 (E. D., N. Y.).

And as stated by Mr. Justice Minton in *Moser v. United States,* 341 U. S. 41 at page 46:

> "The qualifications for and limitations on the acquisition of United States citizenship are a political matter * * *.

---

[2]The advice he received from his Local Board advisor was merely that at some future date he might explain to a Naturalization Court the circumstances under which he sought the exemption. *Cf. Moser v. United States,* 341 U. S. 41, wherein the petitioner filed his application for exemption only after "seeking information from the highest authority to which he could turn."

> Thus, as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship."

Appellee sought exemption as an alien of a neutral country. Under the Rules and Regulations of the Selective Service Act and instructions given to appellee's Local Board, the status which appellee claimed for himself "that of a neutral alien" was recognized by his Local Board, and he was granted the exemption from military service which he sought. When the appellee signed D. S. S. Form 301, he was fully aware that he was bartering the privilege of becoming an American citizen for the right to remain out of uniform. As stated by District Judge Kaufman in *Application of Mannerfrid,* 101 Fed. Supp. 446 at page 448:

> "His only error was a lack of foresight, and inability to foresee that his attitude might change when World War II faded into history, and citizenship could be obtained without the necessity of exposing himself to the hazards of warfare."

And as stated by District Judge Gourley in *In re Martinez, supra,* page 108:

> "It does not seem fair or reasonable to me at this late date that an individual should escape the consequences of declarations against interest contained therein, by any resort to impeachment of what may have been set forth in a questionnaire or in a form which might have been executed."

## Conclusion.

Thus to summarize:

1. Appellant contends that the determination of which nation was and which nation was not neutral within the meaning of the Selective Training and Service Act of 1940, was a matter for the Executive which the Court may not go behind.

2. Even if the determination of neutrality is reviewable by the Court, the Regulation defining a citizen of a neutral country was valid unless unreasonable or inappropriate or plainly inconsistent with the statute. The concept of neutrality for the purpose of the Selective Service Law is not necessarily the same as for other purposes and any other contexts, and as stated by District Judge Goddard in *In re Molo, supra:*

> "The Director of Selective Service adopted the Regulation which, for the purposes of the Act, drew a clear-cut line and provided for the efficient and speedy administration of the Act. It clearly protected the rights of 'neutrals.' The Regulation was plainly a fair and reasonable one and consistent with the Act."

Viewed in this light, France, after her surrender, was no longer "a co-belligerent country nor an enemy country" and fitted the definition adopted by the Director of Selective Service.

3. Appellee clearly understood the consequences of his act, enjoyed the well calculated benefits thereof, and should

be estopped now from repudiating his prior deliberate acts.

4. The penalty of debarment imposed by the statute is clear and unequivocal.

5. Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.

*United States v. Manzi,* 276 U. S. 463, 467.

And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the Court as to any esential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

*United States v. Schwimmer,* 279 U. S. 644, 649-650.

Wherefore, appellant earnestly contends that the appellee, having sought and received exemption from military service as a citizen of France "which is neutral in the present war" should be debarred from citizenship and the judgment of the lower Court should be reversed.

Respectfully submitted,

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No. 13,865

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

RENE BUSSOZ,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

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---

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

RENE BUSSOZ,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### Jurisdictional Statement.

(a) The United States District Court for the Southern District of California had jurisdiction by virtue of 8 U. S. C. 701 (Jurisdiction to Naturalization), and the matter came before the Court on the Motion of the United States of America for an Order denying the Petition of Rene Bussoz, a citizen of France, for naturalization [Tr. 5].

(b) This Court has jurisdiction by virtue of 28 U. S. C. 1291 (Final Decisions of District Courts).

## Statement of Facts.

The appellee feels that there are certain facts contained in the partial record on appeal which are essential to an understanding of the case in addition to those which are set forth in the Statement of Facts in the appellant's brief and therefore sets forth herewith his own statement of facts.

Rene Bussoz, the appellee herein, was born March 13, 1906, in Paris, France, a native and national of that country. Between May 6, 1929 and July 16, 1929, a period of slightly more than two months he served in the French army, all of which time was spent in a hospital and at the conclusion of which time he was discharged permanently for reasons of health [Tr. 4, 112].

Rene Bussoz came to the United States as a permanent resident on December 6, 1939, with the intention of becoming a citizen [Tr. 3, 43]. He filed his declaration of intention to become a citizen of the United States five months later on May 8, 1940 [Tr. 111].

He brought with him the right to manufacture in this country certain diving equipment which is used by the Underwater Demolition Teams of the United States Navy. This Aqua-Lung is unique equipment which affords much more effective performance under water. Commander F. D. Fane, U. S. N., testified that in developing this equipment appellee's sincerity went "above dollars and cents" and that he picked out business missions in the interest of the country [Tr. 35-39, 58].

As soon as required by law, the appellee registered with the Selective Service System [Tr. 43].

At first he was too old to be called under the then existing regulations. When the age was raised he was sent a questionnaire, Selective Service Form No. 304 "Alien's Personal History and Statement" to fill out [Tr. 45].

Form No. 304 contains under Section XI "Statement of Alien" the following blank to be filled in "41. I ..... object to service in the land or naval forces
(do, do not)
of the United States." Appellee had read in the papers and seen in the movies reports of the Germans shooting hostages, and taking people to concentration camps and he felt that he would not be protected by the rules of war if he were captured by the Germans, since he had been compelled to sign an oath not to join any armed force before being allowed to leave France [Tr. 45, 71].

At this time the appellee had three members of his immediate family residing in France, in that portion which was occupied by the Germans [Tr. 113]. He feared that the Germans would take reprisal against his family if they heard that he had even indicated his willingness to serve in the armed forces of the United States [Tr. 32]. He therefore desired to complete question 41 by having it state "I do object to service in the land or naval forces of the United States" [Tr. 46]. The Chairman of his draft board insisted that if he did this he would be required to fill out Selective Service Form No. 301 'Application by Alien For Relief From Military Service" [Tr. 46]. This form was applicable only to citizens of neutral countries.

The appellee was aware of the possible consequences of signing Form No. 301, he testified "if I were a neutral I would be barred forever to become a citizen. If I were

not a neutral, I wouldn't be" [Tr. 46]. The appellee did not believe that France was a neutral [Tr. 32, 34, 46]. He tried to explain to the draft board that France was not a neutral [Tr. 46]. He tried to explain it many times [Tr. 46]. He finally was sent by the draft board to one of its official advisors [Tr. 47, 29] Samuel J. Crawford. He explained his whole problem to the draft board official [Tr. 47]. Mr. Crawford believed that he was "very sincere" [Tr. 34]. He explained to Crawford his problems and his belief that France was a neutral [Tr. 31-32]. Crawford told him to object [Tr. 47] and completely worded for the appellee the Affidavit [Ex. C, Tr. 117] which was prepared because of appellee's concern that he might in the future have difficulty about his United States citizenship [Tr. 31, 47].

In doing all this he relied upon and followed the advice of the draft board official, as to the best means to protect his rights to become a citizen [Tr. 46, 47].

This occurred on April 5, 1943 [Tr. 114]. France had been at war with Germany since September 3, 1939, with Italy since June 11, 1940, and with Japan since December 8, 1941. Diplomatic relations between the U. S. A. and Vichy were severed by the United States State Department on November 8, 1942 [Ex. 1]. On that very day, April 5, 1943,

> "Allied and United States made an air raid on the Krupp works at Essen and followed it up with a day air attack on the Renault plant at Billancourt near Paris, dropping 900 tons of bombs. It was reported that 133 planes took part in the Renault raid, and that four ton explosives were showered at the Krupp plant at the rate of six a minute. The Allies lost 21 bombers. Of the Renault raid Berlin

said the population suffered several hundred dead and wounded. Vichy said 400 persons were killed" [Ex. 6].

On October 26, 1944, the appellee was reclassified 4A, that is, over age for military service [Tr. 120].

Then Paris was liberated and the De Gaulle regime recognized as the true French. The appellee described his immediate conduct as follows:

> "Well, when the liberation of France was released in the press, I immediately got in touch with Mr. Crawford and asked him for an appointment, and as quick as I got an appointment came to talk to him and said in my heart I couldn't see any reason any more for me objecting to the service as my family was not any more in the German lines * * *" [Tr. 49].

Or as Mr. Crawford put it, "he wanted to * * * join the United States Army. * * *" [Tr. 33].

Once again the draft board official counselled him, and prepared for him the document by which he offered his services [Tr. 33]. That is Exhibit E which reads as follows:

"November 6, 1944.

Local Board, No. 15,
New York County
570 Lexington Avenue
New York 22, New York

Re: Rene Bussoz—Order No. 1245A

Gentlemen:

Under date of April 8, 1944, I was classified as 4-CH and again on October 26, 1944, I was reclassified as 4-A.

If you will refer to my reasons for requesting the 4-CH classification which were contained in affidavits sent to you at the time of signing my questionnaire, you will find the reasons therein set forth which prompted me at that time to decline to serve in the military forces of the United States (I being a citizen of France).

In the last week the situation has changed in France to the point where the reasons I gave for my deferment and classification do not now exist and *I would like very much now to have myself classified as being willing to serve in the armed forces of the United States and to be placed in whatever classification the Board cares to place me.*

It would seem convenient that you should transfer this application to the Santa Monica Board No. 243 in whose jurisdiction I now live and have lived for the past three years for whatever further action they wish to take in reference to my reclassification.

*I trust you* will give the matter your immediate attention and *will advise me if there is anything further I must do other than the request made in this letter.*

Yours very truly,
/s/ Rene Bussoz." (Emphasis added.)

The draft official testified that this was done at Bussoz' request and as an attempt to present himself for service in the United States Army [Tr. 33]. The appellee testified as follows as to his understanding of the meaning of the letter:

"Q. And he told you that was the proper procedure for presenting yourself for service, is that

right? A. He told me this was the only way I had to prove to this Country my sincerity and I signed" [Tr. 56].

The appellee never received any reply to this letter [Tr. 50].

This letter was written on November 6, 1944. As of November 9, 1944, according to the official United States army reports, the United States casualties had been 509,195. At the end of the war the total casualties were 1,070,452, that is to say more than half of the casualties occurred after the date on which the appellee "offered my services immediately."

The appellee obtained a copy of letter of opinion from the State Department [Ex. 4] and sent it to his draft board which after a time returned to him a photostatic copy of his notice of intention to become a citizen, or "first papers" so that he could take steps to become a citizen [Tr. 56-57]. On the advice of the Immigration officials he waited two years before proceeding, and on the 16th day of September, 1947, the petitioner, Rene Bussoz, applied for citizenship and on the 15th day of May, 1952, the Immigration and Naturalization Service made a motion to deny his petition and thereafter, commencing on the 21st day of July, 1952, hearings were conducted in the District Court on the petition. Only a portion of those proceedings appear in this record on appeal. The petition was ordered granted on the 29th day of September, 1952, and the defendant was admitted to citizenship on December 12, 1952.

## Summary of Argument.

I. Appellee's execution of the DSS Form No. 301 cannot affect his right to become a United States citizen because the execution of that form was a nullity since appellee was not then a citizen of a neutral country.

A. France was not a neutral country at the time appellee signed DSS Form No. 301. This was correctly determined by the District Judge based upon persuasive evidence that this political question had been decided in appellee's favor by the Executive branch of the government.

B. The Selective Service Regulations do not give any basis for deciding the question of France's neutrality or non-neutrality differently than did the District Judge.

II. Where the appellee has at all times acted toward the appellant openly and consistently and has relied upon the advice of appellant's agent in choosing his course of action, the appellant cannot raise the issue of estoppel upon appeal.

A. The record shows that appellee at all times told the Government that France was not a neutral, and that he did just what the Government's agent told him to do in order to advise the Government of his position and to protect his rights.

B. The record shows that the issue of estoppel was not raised in the trial court; it cannot be raised here on appeal for the first time.

## ARGUMENT.

### I.

### Appellee's Execution of DSS Form No. 301 Cannot Affect His Right to Become a United States Citizen Because the Execution of That Form Was a Nullity Since Appellee Was Not Then a Citizen of a Neutral Country.

The objection by the Government to appellee's admission to citizenship was based (in so far as we are now concerned with it) upon the fact that he had executed a DSS Form No. 301, "Application By Alien For Relief From Military Service." The basis for the objection is the language of Section 3a of the Selective Service and Training Act of 1940 as amended (54 Stat. 885, 50 U. S. C. App. 303(a)):

> "* * * Provided, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: * * *."

The cases are clear and uniform in their holding that the mere execution of DSS Form No. 301 does not, of itself, always mean irrevocably that the alien who executes it cannot thereafter become a citizen. There are certain

types of situations in which the execution of the form is held to be a nullity.

*McGrath v. Kristenson,* 340 U. S. 162, 71 S. Ct. 224, 95 L. Ed. 173 (1950);

*Moser v. United States,* 341 U. S. 41, 71 S. Ct. 553, 95 L. Ed. 729 (1951);

*Machado v. McGrath,* 193 F. 2d 706 (1951);

*Mannerfrid v. United States,* 200 F. 2d 730 (1952);

*Petition of Ajlouny,* 77 Fed. Supp. 327 (D. C. E. D. Mich., 1948).

The cases which hold that it is a nullity because the alien was ignorant of the meaning of his act do not apply directly to this case because here the appellee knew that if he was a neutral at the time he signed the No. 301 Form, it would bar him from citizenship [Tr. 46]. (*Moser v. United States, Machado v. McGrath,* and *Mannerfrid v. United States,* all *supra.*) But the cases do not limit themselves to this basis. They further hold that an alien who for any reason does not fit the description of the statute will not be debarred from citizenship even though he has executed the DSS Form No. 301.

The leading case on this point is *McGrath v. Kristenson, supra,* which holds that even though an alien has been determined by the Selective Service System to be one who by virtue of his residence in the United States must come under its jurisdiction and the alien therefore signs the DSS Form No. 301 the District Court can review the question of his residence and if he is found not to have been a "male person residing in the United States," as provided in Section 303(a), then the Form No. 301 is a nullity.

A case squarely on the point before the Court here is *Petition of Ajlouny* (*supra*) in which the District Court re-examined the question of whether the petitioner's native country was a neutral country and contrary to the ruling of the Selective Service System ruled that it was not a neutral and admitted the Alien to citizenship in spite of his execution of the DSS Form No. 301.

In fact the Government does not quarrel with this general proposition and accepted it repeatedly in the trial court [Tr. 62, 63, 64, 75] and apparently accepts it in this appeal. On this phase of the appeal the Government's argument is that the question of France's neutrality was not one that could be decided by the trial court. *Petition of Ajlouny, supra,* is a clear holding to the contrary on this point.

**A. France Was Not a Neutral Country at the Time Appellee Signed DSS Form No. 301. This Was Correctly Determined by the District Judge Based Upon Persuasive Evidence That This Political Question Had Been Decided in Appellee's Favor by the Executive Branch of the Government.**

Although in the trial court the Government did not rely upon the proposition that the question of France's neutrality was a political question [Tr. 76, 88] and in fact accepted the proposition that evidence was admissible on this subject [Tr. 64, 92] nevertheless it seems clear from the incomplete record on appeal that the trial judge recognized that the question was a political one which had to be decided by the executive arm of the Government. See the record at page 90 where the following colloquy occurs:

> "The Court: Well, Mr. Garner, who determines in this country whether or not France was a neutral

country, the Department of State, the Department of War, the Selective Service System? Who determines it?"

And on page 92:

"The Court: I am not qualified, I am unble to make the determination whether or not France was a neutral nation."

And again on page 92:

"The Court: Do you think you can get any information from the Department of State or from Washington or from Selective Service as to whether or not France was a neutral nation in April 5, 1953?"

And in his Opinion the District Judge said in part:

"The problem before this Court to be solved is whether or not on the date application for relief from military service was filed by petitioner, to wit, September 20, 1949, (*sic*) France was a neutral country.

"On September 29, 1942, the Director of Selective Service classified France as a neutral, and because of this classification petitioner was required to sign Form 301. Petitioner now contends the Director of Selective Service was incorrect in classifying France as a neutral. At the trial petitioner presented a letter from the Department of State, Washington, D. C., dated August 7, 1946, signed by Walter Walkinshaw, Chief, Public Views and Inquiries Section, Division of Public Liaison, which stated: 'During World War II France's status was never that of a neutral country. France declared war against Germany September 3, 1939, and a state of war was declared to exist between France and Italy June 11,

> 1940. Armistice agreements were signed between France and Germany June 22, 1940, and between France and Italy June 24, 1940. At the present time France is in a state of armistice relations with Italy, pending the drawing up of an Italian peace treaty * * *'
>
> "Hence, we have one department of government holding France to be a neutral and another department of government holding to the contrary." [Tr. 14.]

Thus we see that the District Judge recognized that the question of France's neutrality or non-neutrality was a political one upon which he as a member of the judicial arm of the Government could not review the action of the executive arm and in the course of the trial he set himself about to determine what had been the position of the executive arm. Although the record is not complete we see that he received evidence of a clear expression by the State Department, *that branch of the executive arm which customarily determines such questions,* of the fact that "During World War II France's status was never that of a neutral country" [Ex. 4]. Additional evidence was received which showed that on April 4, 1943, the day upon which the appellee signed DSS Form No. 301, that the War Department of the executive arm of the United States was actually engaged in bombing the principal city of France and it was reported that 400 persons were killed, clearly an expression by that branch of the executive arm that France was not a neutral country [Ex. 1].

Further evidence of the attitude of the executive arm of our Government toward France's non-neutrality is re-

vealed in Exhibit 1 as shown by the fact that on November 8, 1942, diplomatic and consuler relations between the United States of America and the Vichy government were severed and were never thereafter restored [Ex. 1].

Now, courts have refused to determine for themselves certain types of questions which are classified as "political" and have accepted the answers given to them by the executive or legislative arms of the Government. One of these types of questions is the question of the neutrality of a foreign power. The trial judge recognized this and acted upon it.

But before a court can follow the determination of the executive arm of the Government on a political question the court has to find out what the political arm of the Government has decided on the question. That's exactly what the District Judge set out to do in this case.* We do not know what evidence was brought before the judge on the question of what the Executive arm had decided as to this political question. We do know that on July 28, 1952, the court allowed each side until September 1, 1952, to file additional evidence [Tr. 7]. We know that the court availed itself of reference to the *Encyclopaedia Britannica* [Tr. 15] to help itself decide this question, as it could properly do.

Fed. Rules of Civ. Proc., Rule 43(a);

*Cal. Code Civ. Proc.,* Sec. 1875.

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*[Tr. 92]:

"The Court: Do you think you can get any information from the Department of State or from Washington or from Selective Service as to whether or not France was a neutral nation in April 5, 1953?"

Appellant is asking this Court to decide this factual question, *i. e.,* what the executive arm had decided about France's neutrality or non-neutrality, without this Court having before it the evidence upon which the District Court decided the question. This Court has time and again said that it would not do this and that in the absence of a complete record of the proceedings below, it is to be presumed on appeal that the evidence supported the decision of the trial judge.

*Hardt v. Kirkpatrick,* 91 F. 2d 875 (C. C. A. 9, 1937);

*Williamson v. Richardson,* 205 Fed. 245 (C. C. A. 9, 1913);

*Fidelity & Deposit Co. of Maryland v. Lindholm,* 66 F. 2d 56, 89 A. L. R. 279 (C. C. A. 9, 1933).

It is true as appellant argues that courts usually determine the question of what action the executive department of the Government has taken by judicial notice. But the fact that a matter can be judicially noticed does not mean that evidence is precluded on that point. It merely means that the party with the burden of proving that fact is relieved of proving it. It does not mean that the other party is precluded from offering evidence on the subject.

*Ohio Bell Telephone Company v. Public Utility Commission of Ohio,* 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093;

*In re Bowling Green Milling Co.,* 132 F. 2d 279;

*United States v. Aluminum Company of America,* 148 F. 2d 416.

Courts have properly made inquiry of the executive branch itself to resolve these questions.

*Puente v. Spanish National State,* 116 F. 2d 43, cert. den., 314 U. S. 627;

*Jones v. United States,* 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691.

We know that the trial judge looked to sources that do not appear in the partial record before this Court, as was proper for him to do. We do not know what other material came before him on the issue. How can this Court substitute its judgment for that of the trial court without the facts upon which the judgment was based?

**B. The Selective Service Regulations Do Not Give Any Basis for Deciding the Question of France's Neutrality or Non-neutrality Differently Than Did the District Judge.**

The original Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Supp. 301-318) contained a provision authorizing the President, or his designated subordinate, "to prescribe the necessary rules and regulations to carry out the provisions" of the Act. The President delegated that authority to the Director of Selective Service by Executive Order No. 8545 (5 Fed. Reg. 3779). The Director of Selective Service exercised that authority and issued a whole body of regulations with periodic amendments. These were published in the Federal Register and periodically collected in the Supplement volumes of the Code of Federal Regulations.

On December 18, 1941, the Director issued a series of amendments to the regulations among which were certain definitions.

§601.1. *Definitions to govern.* The definitions contained in this part shall govern in the interpretation of the Selective Service Regulations.

§601.2. *Aliens.* (a) The term "alien" means any person who is not a national of the United States.

(b) The term "national of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(c) The term "citizen or subject of a neutral country" is used to designate any alien except (1) a citizen of a cobelligerent country or (2) an alien enemy.

(d) The term "cobelligerent country" means any country at war with a country against which the United States has declared war.

(e) The term "alien enemy" means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States. 6 Federal Register 6825. 32 C. F. R. 1941 Supp. 2796.

This is the first appearance of this definition and it remained unchanged throughout all of the period with which we are concerned. It is the only place in which the Director of Selective Service purported to exercise his authority to issue regulations on this subject.

The question of whether France was a neutral or non-neutral country within the meaning of the Regulations would depend then upon whether she was a cobelligerent, *as defined in the regulations.* That is, was she at war with a country against which the United States had declared war? She certainly was at war with Germany and Italy, being in a state of military occupation by the former power. And the United States had declared war against both of those countries on December 11, 1941.

So we see that under the definition laid down by the Selective Service Regulations France was not a neutral.

There was offered in evidence a copy of Local Board Memorandum No. 112, Subject: Classification of Aliens [Ex. D]. This in no way purports to be a part of the regulations nor does it purport to amend the regulations. It is an expression of opinion by the Director of Selective Service of a factual question, as is seen by the following language:

> "* * * To assist local boards in determining whether or not an alien registrant is a citizen or subject of a neutral country, there is attached to this release a list of all countries divided into three groups: (1) enemy countries, (2) cobelligerent countries, and (3) neutral countries. * * *"

In other words, the local boards still had the responsibility of applying the regulations and the Local Board Memorandum's list was to assist them in this.

These Local Board Memoranda are not part of the regulations as is seen by the fact that they were proven

in the case like any other document of a public body. In this connection perhaps this Court will indulge the appellee if he quotes from part of another Local Board Memorandum which does not appear in the record. That is Local Board Memorandum No. 1 as amended April 17, 1943:

"Subject: Regulations, Forms, and Memoranda Received by Local Boards from National Headquarters.

"1. Regulations, instructions and information.—the following are the principal media by which regulations, instructions and information will be transmitted by National Headquarters to local boards:

"(a) Selective Service Regulations.

"(b) Local Board Memoranda.

"(c) Selective Service Forms and Instructions for Forms. * * *."

Clearly these memoranda cannot change the Regulations, and they do not purport to do so, and the Selective Service System recognized the distinction.

## II.

## Where the Appellee Has at All Times Acted Toward the Appellant Openly and Consistently and Has Relied Upon the Advice of Appellant's Agent in Choosing His Course of Action, the Appellant Cannot Raise the Issue of Estoppel Upon Appeal.

### A. The Record Shows That Appellee at All Times Told the Government That France Was Not a Neutral, and That He Did Just What the Government's Agent Told Him to Do in Order to Advise the Government of His Position and to Protect His Rights.

In order to maintain that a party has been estopped by his conduct at least four elements are necessary:

1. Ignorance on the part of the party claiming the estoppel of the matter asserted; 2. Silence concerning the matter where there is a duty to speak amounting to a misrepresentation or concealment of a material fact; 3. Action of the party relying on the misrepresentations or concealments, and 4. Damages resulting if the estoppel is denied.

*James v. Nelson,* 90 F. 2d 910 (1937);

*Uhlmann Grain Co. v. Fidelity Deposit Company of Maryland,* 116 F. 2d 105 (1941).

Or as this Court said in *Debold v. Inland Steel Company,* 125 F. 2d 369 (1942) at 375: "Estoppel arises when one has so acted as to mislead another and the one that was thus misled has relied upon the action of the inducing party to his prejudice."

None of the elements of estoppel are present in this case and in fact even the incomplete record here on appeal reveals clearly that there is no basis for a claim of estoppel.

(1) The United States of America was not ignorant of the matter asserted below by the appellee. First, all of the facts asserted by the appellee below were matters of public knowledge and information at the time that appellee executed his Form 301. Secondly, as of that time not only were these facts known but the appellee's position, namely, that France was not a neutral country, was made known by him to the Selective Service System [Tr. 46].

> "Of course, I tried to explain that France was not a neutral country and that I had good reasons to think it was not a neutral country, but this particular chairman of the board in my case said France was a Neutral and did not want to listen to any reasons and said 'You are a neutral. Sign Form 301.'"

And before appellee signed the Form 301 the record shows from the testimony of an official from the Selective Service System, Samuel J. Crawford, that he told exactly what his position was.

> "Q. Did you know at that time whether or not France was a neutral country? A. Well, I didn't know. I think that is a legal problem. I don't know whether it was or not. *I know that he didn't think it was.*
>
> Q. Did he tell you that, at that time? A. Yes." [Tr. 31.]

And on page 32:

> "Q. In other words, he always maintained to you that France was not a neutral country and despite the insistence of the Selective Service Board that France was a neutral, he always maintained to you that France at that time, in April, 1943, was not a neutral country? A. Well, he stated that it wasn't, but I didn't know."

(2) There was neither concealment by the appellee nor silence where there was an obligation to speak. Bussoz at all times advised the Selective Service System of this position [Tr. 31, 32, 46].

(3) There was no action by the United States in reliance upon any representation or concealment by the appellee sufficiently detrimental to the United States to justify the invocation of the doctrine of estoppel. Firstly, as point out above there was no concealment or misrepresentation but, secondly, it should be pointed out the record discloses that Bussoz had been discharged from the French army as unfit for military service on account of physical infirmity and that therefore the likelihood of his being called to service would in any event have been very slight. But more important than this is the fact that as soon as the circumstances changed that had caused him to fear that if he expressed his willingness to serve in the Armed Forces of the United States that he and his family would be victims of reprisal, namely, as soon as the liberation of Paris by the American troops in 1944 occurred, he immediately [Tr. 49] got another appointment with Mr. Crawford, the official of the draft board who had advised him in preparing his Form 301, and drafted the accompanying affidavit. He went to him, as Mr. Crawford said, "At a time when he wanted to then comply with this request *and join the United States army*" [Tr. 33]. Once again the official of the draft board prepared at Bussoz's request a statement of his then position which is set forth in the record in Exhibit E where he says in part:

> "In the last week the situation has changed in France to the point where the reasons I gave for my deferment and classification do not now exist and

> I would like very much now to have myself classified as being willing to serve in the armed forces of the United States and to be placed in whatever classification the Board cares to place me. * * *
>
> "I trust you will give the matter your immediate attention and will advise me if there is anything further I must do other than the request made in this letter."

The draft board chose to take no action on this letter but as is disclosed in the case of *Petition of Ajlouny,* 77 Fed. Supp. 327, 329, there was a provision under the Selective Service System for the withdrawal of a Form 301 when the circumstances requiring it changed. And the Selective Service System provided for the immediate induction of such registrants. Moreover, the withdrawal by the appellee of his objection to military service and his volunteering for immediate classification in whatever position the draft board wished to put him was not a mere empty gesture since it was expressly made with knowledge of his classification as being over age and therefore was a waiver of whatever deferment he might have had by way of such classification. Moreover, as of Thursday, November 9, 1944, the United States' casualties had numbered 509,195 and as of Thursday, September 6, 1945, the total casualties numbered 1,070,452.* In other words, more than half of the casualties suffered by the United States' forces took place after the date upon which Bussoz volunteered for military service.

(4) The appellant Government will suffer no damages if the estoppel is denied. It had the opportunity to induct

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*Facts on File, Vol. IV, 1944, New York.

the appellee during the war. The only present effect of granting the claim of estoppel would be to take away the citizenship of an educated, energetic, loyal American who came to this country primarily because of his devotion to the principles of American government and society. His business is of importance in the national defense of this country [Tr. 35 *et seq.*]. And he is to be deprived of his new citizenship because he sincerely believed that if he indicated that he was willing to serve in the armed forces of the United States he would endanger his family and when this danger had passed he volunteered immediately for service in the armed forces of the United States.

If estoppel could be raised at all it would be against the appellant whose agents first insisted that the Form No. 301 had to be signed if he was to indicate his unwillingness to be inducted on his Form No. 304 and whose agent, Mr. Crawford, prepared the affidavit which was to protect the appellee in his future efforts to obtain his citizenship. The recent case of *Petition of Berrini,* 112 Fed. Supp. 837 (1953), is very similar to this case on this point.

In the *Berrini* case a Swiss national signed the Form No. 301 after being advised by the Swiss Legation that the United States State Department had said that executing the Form No. 301 would not debar him from citizenship. The court in that case ruled that since he acted under the impression that he would not be debarred from citizenship he did not make an intelligent choice and so the Form No. 301 was a nullity.

In the present case the appellee acted on the instructions and advice of the Selective Service officials as to what he could do to preserve his family's safety and his own chances of future United States citizenship.

All of the arguments advanced by appellant to support his claim of estoppel could have been urged in the trial court, certainly the District Judge had no desire to admit an undesirable alien. Such record as appears clearly supports the fact that appellee is a thoroughly desirable citizen.

The comparison with *In re Molo,* 107 Fed. Supp. 137, is certainly not helpful to this Court. Molo was an Iranian citizen. Nothing happened to change the Iranian situation at the time Molo sought to withdraw his Form No. 301. In the case of the appellee here he did everything he knew to do to withdraw his Form No. 301 just as soon as he could after the situation changed and France was liberated. Judge Westover had the opportunity to judge of appellee's sincerity and motives and clearly decided, as had the Selective Service official, that they were of the highest. The age regulations changed many times during the war, both up and down. Appellee had no assurance that his age classification would remain the same and his letter was clearly a waiver of any rights he might have had by virtue of such classification.

**B. The Record Shows That the Issue of Estoppel Was Not Raised in the Trial Court; It Cannot Be Raised Here on Appeal for the First Time.**

There is nothing in the partial record here on appeal to show that at any time in the trial court the appellant urged the issue of estoppel and in fact the record discloses numerous statements to show that the case was tried under an entirely different theory.

> "The Court: Mr. Garner, are you willing to admit that the real issue here, on this phase of the case, is whether or not France was a neutral country?
>
> Mr. Garner: I think that is what it hinges on here, your Honor.
>
> The Court: Let us assume that it was not a neutral country.
>
> Mr. Garner: Then if it wasn't clearly under the Selective Service Act the Form 301 was a nullity." [Tr. 62.]

And again:

> "The Court: Well, Mr. Garner is willing to admit or willing to stipulate that the real issue here is whether or not France was a neutral nation."

It is a well established principle of law that appellate courts will not give consideration to issues not raised in the court below, and this principle is as applicable to a review of a naturalization petition as any other matter.

*Tutum v. United States,* 270 U. S. 568;

*Delgadillo v. Carmichael,* 332 U. S. 388 (1947).

This would be true of any issue but it is particularly applicable here. Estoppel is a question of fact.

*Quon v. Niagara Fire Ins. Co. of N. Y.*, 190 F. 2d 257 (C. C. A. 9, 1951);

*Dickenson v. General Accidental Fire and Liability Assurance Corp.*, 147 F. 2d 396 (C. C. A. 9, 1945).

Here we do not have the facts upon which to decide it if it were within the province of an appellate court to decide questions of fact, which it is not.

Wherefore, appellee respectfully urges that the clearly correct judgment of the District Court should be affirmed.

Respectfully submitted,

RICHARD F. C. HAYDEN,

*Attorney for Appellee.*

No. 13,866

# United States
# COURT OF APPEALS
## for the Ninth Circuit

SOLON B. CLARK, JR. and GERALDINE A. CLARK, husband and wife, and RELATED CASES,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

## BRIEF FOR THE APPELLANTS

*On Appeal from the United States District Court for the District of Oregon.*

GERALD J. MEINDL,
American Bank Building,
Portland, Oregon,
SOLON B. CLARK,
A. C. ALLEN and
SAMUEL B. LAWRENCE,
Swetland Building,
Portland, Oregon,
IRVING RAND,
Public Service Building,
Portland, Oregon,
RAY G. BROWN,
Henry Building,
Portland, Oregon,
*Attorneys for Appellants.*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10–53

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The United States, in its capacity as the landlord of the appellants, and by its retaining control of the area in question, owed a duty to its tenants, including the appellants, to keep the area in question safe, or at least not to mislead the appellants as to safety, and further the United States acting through the Army Engineers and Housing Authority of Portland assumed this duty which they failed to perform ..... 32

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In the trial of this cause the appellee asserted the defenses of assumption of risk by the appellants, that the cause of the damage was an act of God, that the acts of the agents and employees of the United States were done in a period

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## BRIEF FOR THE APPELLANTS

*On Appeal from the United States District Court for the District of Oregon.*

## OPINIONS BELOW

The District Court rendered two opinions (R-15(1-9) and R-16(1-25) ), the first opinion being dated September 8, 1952, and reported in *13 F.R.D. 342,* and the second opinion being dated October 23, 1952, and reported in *109 F. Supp. 213.* Its Findings of Fact and Conclusions of Law are not officially reported. Due to the fact this Court has waived the printing of the record herein, the appellants call to the attention of the Court the fact that the Pre-Trial Order is set forth practically in full in *13 F.R.D, pages 346 to 406 inclusive.*

## JURISDICTION

These are actions for recovery of damages from the United States of America under the Federal Tort Claims Act. The cause of action arose on May 30, 1948, being the date of the Vanport flood, which occurred in Multnomah County, Oregon. These actions were filed in the United States District Court for the District of Oregon within two years after the right to a cause of action arose. Jurisdiction over these actions existed in the District Court under 28 U.S.C. 1346 (b). Judgment in favor of the appellee and against the appellants was entered January 29, 1953 (R-19). Notice of Appeal was filed March 27, 1953 (R-20). Jurisdiction of this Court to hear and determine this appeal is conferred by 28 U.S.C 1291.

## QUESTION PRESENTED

Whether or not the appellants are entitled to recover for the damages they suffered, from the appellee, the United States of America, under the provisions of the Federal Tort Claims Act.

## STATEMENT

The parties stipulated that twenty cases be selected out of more than 700 cases on file in the District Court and that these twenty cases be consolidated for trial for a determination on the sole issue whether or not the United States was liable for damages (P.O., Pretrial

Order 2). All other cases involving this same matter on file in the District Court, by agreement between all the parties were bound by the foregoing stipulation (R. 11).

Many of the pertinent facts were stipulated (P.O. 3-82 a) and may be summarized briefly as follows:

All of the appellants resided in Peninsula Drainage District No. 1, being the site of Vanport and situated in Multnomah County, Oregon (P.O. 5). The general boundaries of Peninsula Drainage District No. 1 are: on the north, Oregon Slough; on the south, Columbia Slough; on the west, lowlands subject to flood; on the east, another drainage district known as Peninsula Drainage District No. 2. The boundary between Districts No. 1 and No. 2 is the highway fill known as Denver Avenue (P.O. 5). West of the westerly boundary of District No. 1 is land which the Columbia River floods during most high waters. Between this area and District No. 1 are two railroad fills, and a highway fill. One railroad fill supports the tracks of the S. P. & S. Railway Company, and the other supports the tracks of the Union Pacific Railroad Company. These two fills join and the tracks connect at a point approximately midway between Oregon Slough and Columbia Slough (P.O. 5).

The elevation within the district varies from six to thirty feet, and in the absence of protecting embankments much of it would be inundated during all flood stages of the river.

The north and south banks are protected by levies and these levies were improved and strengthened by the United States government pursuant to Section 5 of the

Flood Control Act of 1936, 49 Stat. 1590 (P.O. 11).

The western embankment consisted of a railroad fill known as the Union Pacific fill, which extended northerly from the Columbia Slough for a distance of approximately 3200 feet, to where it joined the fill of the S. P. & S. Railway Company. North of this point of junction, a single structure, consisting of the combined railroad fills and the highway fill, is between the flooded lands on the west and the district itself. It was this structure that failed on May 30, 1948 (P.O. 15).

The fill that failed was constructed between 1910 and 1918, the original of said fill being a trestle over a lake bed known as Smith Lake, which, between 1910 and 1918, was filled in by dumping material down through and over the trestle. The stringers of the trestle were removed but the pilings were not. The material that was used was of a sandy nature, but nothing more was known than that as to the materials used (P.O. 16). From the time the fill was completed in 1918 until the high water period of May, 1948, the fill never subsided, caved, or sloughed off (P.O. 17).

Immediately north of the previously described fill was the S. P. & S. fill, part of which also failed. This fill was built in the same manner as the previously described fill (P.O. 18).

The width of the break in the fills heretofore described was 590 feet, and occurred at a point where the fill had been constructed on the bottom of an arm of Smith Lake. The lake bottom consisted of the natural soil of the area, that is, sand and silt (P.O. 24).

On May 30, 1948, at the time of the break, the elevation of the water adjacent to the embankment that failed was 30.8 feet. Prior to 1918, when the fill was filled in, water could flow through the trestle into the district and as a consequence the fill was not subject to side pressure. Since 1918, up to the time of the break, there have been only three occasions when the elevation of the water exceeded 27 feet, namely, on June 12, 1921, 27.4; May 31, 1928, 27.6; and June 19, 1933, 27.7, the last elevation being the strongest test of water pressure on the side against the fill in question, since the time of its construction, and the elevation of the water at the time of the break being 3.1 feet higher than ever before (P.O. 25).

The land constituting Vanport, upon which the appellants resided, was acquired by the United States in a condemnation proceeding filed November 4, 1942, and the United States was the owner in fee of all the property in question from that date up to and including May 30, 1948 (P.O. 31). Vanport was built by the Federal Public Housing Authority (P.O. 30) and, by an instrument designated as a master lease, the management of the project was turned over to the Public Housing Authority of Portland (P.O. 32). On May 30, 1948, a total of 5,270 units in Vanport were occupied, and approximately 15,810 persons lived in Vanport (P.O. 51).

The United States Weather Bureau accurately predicted river stages (P.O. 53).

On June 7, 1894, the water elevation of the Columbia River was 34.2 feet, and on June 24, 1876, the Columbia

River reached an elevation of 29.4 feet (P.O. 55).

On May 10, 1948, the President of the United States issued Executive Order No. 9957, effective as of noon on that day (P.O. 75), said order being effective until terminated on July 9, 1948, (P.O. 79); said order provided among other things that the possession, control and operation of the railroads, including the fill in question, were taken over by the appellee and the order specifically provided that the two railroads in question were conclusively deemed to be within the possession and control of the United States, *13 F.R. 2503.*

In addition to the foregoing stipulated facts, the following facts were proven conclusively:

All of the appellants were tenants of the United States of America on a month to month basis, and paying their monthly rental. These appellants were all damaged in that they lost personal property belonging to them, the reason for their loss being that they relied on assurances of safety, said assurances being that the dikes would hold and that if there were any danger to arise, they would receive ample warning. These assurances were given to the appellants by officials of the Housing Authority of Portland, newspaper accounts and over the radio (Tr. 28-62, 71-378).

The officials of the Portland Housing Authority, in giving these assurances of safety to the appellants and to the press and radio, relied on the advice given to them by the officials of the Army Engineers (Tr. 677, 678, 731, 736, 738-740).

The Army Engineers gave their official advice that the dikes were safe without any knowledge whatsoever as to how the fill, that gave way, was constructed or what materials were used in the fill (Tr. 335), and the only knowledge that the Army Engineers had at all as to the stability of the dike in question was its size and the length of time it had stood (Tr. 830-831).

In order to be able to give an opinion of any value as to whether or not a dike will withstand certain pressures, it is essential to know the height, width, materials used in construction, condition of the foundation upon which the dike is built, and the method of construction (Tr. 331, 429, 682-684, 1017, 1018). The Army Engineers in giving their opinion as to the safety of the dike in question had none of the above information, except its size (Tr. 830-831).

The Army Engineers, after the break, made an investigation as to the cause of the break. General Walsh testified that the investigation did not disclose the cause of the break (Tr. 334). This case was tried in August, 1951, over three years after the break, and Middlebrooks, a government witness and Chief of the Soil Branch, Office of the Chief of Engineers, testified that the United States Army Engineers were making an investigation of the cause of the break, but no final report had been made (Tr. 979-980).

As to the condition of the fill itself, which gave way, muddy water, described as being soupy and of chocolate color, had been running along the Vanport side of the dike (Ex. 199, pp. 9 and 22). The dike settled about

three days before the break for a distance of from 1500 to 2000 feet, and it settled about three or four inches (Tr. 380-382, 838). The reason for the settling was that the foundation in the fill was being saturated and softened (Tr. 383).

Also, about three days before the break, a crack formed on top of the fill where it broke, which was about sixty feet long and by the day of the break it had widened to about four or five inches (Tr. 383). The piling over which the dike was built contained decayed timbers (Tr. 384 and 559). Boils near the place of the break were discovered around 9:30 A.M. on the day of the break, but there was no one working on them (Tr. 873). The Vanport side of the fill which broke, was covered with briars, brush and cottonwood trees, making visual inspection impossible (Tr. 399 and 459).

At the time of the trial, six witnesses expressed an opinion as to the cause of the break. They were as follows:

1. Stanton, Vice-president and General Manager of the S. P. & S. Railway Company, that the cause of the break was a soft bottom and the hydrostatic pressure against the fill (Tr. 64).

2. Kinser, employee of the railroad and the control tower man, expressed the opinion that the fill was being saturated and softened (Tr. 383).

3. Hines, General Manager of the Metropolitan Water District of Southern California, testified that the cause of the failure could have been a foundation failure, that the base had become water logged, and become

more or less liquid, and suddenly went out, and that the cause of the failure could have been any unknown factor as to the internal part of the dike or the base (Tr. 437-438).

4. Suttle, the engineer for the Drainage District testified that the cause of the break was the soft mud underneath (Tr. 550).

5. Mockmore, head of the Department of Civil Engineering at Oregon State College, testified that there was a sufficient flow of water getting underneath to carry away some of the finer materials and leaving voids, so that pressure could get in these voids in a sufficient quantity to force the water on through to the incipient stage of a quickening condition, similar to quicksand (Tr. 695-696).

6. Philippe, Chief of Soils and Cryology, Branch of the Chief Engineers, testified that the materials on the riverward and landward side must have come from different sources and probably different in characteristics, and that the landward slope was more impervious, and as a result built up a sufficient head to blow the dike (Tr. 1009).

After the failure of the dike, Dibblee, Chief of the Service Branch of the Construction and Operations Division of the Portland office of the Corps of Engineers, made a recommendation that a soil investigation be made of the foundations under these dikes so that such information could be used to determine the necessity of constructing cutoff trenches and core walls, or the necessity of abandoning the dikes and creating entirely

new levees, and further reported on the necessity of enforcing the regulations which provide for the removal of all brush, trees, and high grass, from the levees, in order to remove the hazard to visual inspection of seepage spots. The errors and mistakes of the United States Army Engineers were recognized in this report (Tr. 956).

One of the duties of a district engineer is to prepare a manual for emergency flood control work and such a manual had been prepared for the Portland, Oregon, district, prior to May of 1948, and was in effect throughout the month of May, 1948 (Tr. 322-323). Said manual was Exhibit 64, and provided in part that the Army Engineers should disseminate information regarding the flood. There is not a copy of this exhibit available in Portland at the time of writing this brief, so it is impossible to quote this exhibit in its exact wording.

During the week preceding the break, the newspapers of the area and radio stations carried many articles to the effect that the dikes were safe and that ample warning would be given if any danger arose. These newspaper articles quoted the Army Engineers and the Portland Housing Officials' quoting of the Army Engineers (Exs. 417-431, inclusive).

As found by the Trial Court in its Finding of Fact No. 10 (Findings, 18, p. 6), the Housing Authority of Portland managed the City of Vanport in the interest of the Federal Public Housing Administration, which issued directives and had control of the policies relating to the renting, financial management and supposed welfare of

the inhabitants. This Housing Authority was a federal agency and, with respect to the management of Vanport, it was acting as an agency of the United States.

In spite of the foregoing stipulated facts, and the foregoing proven facts, the trial court entered a judgment in favor of the appellee on January 29, 1953, from which judgment appellants take this appeal.

## STATEMENT OF POINTS TO BE URGED

1. That the District Court erred in finding and holding that the advice given by the Corps of Engineers of the United States was honest and competent.

2. That the District Court erred in finding that there was no negligence on the part of the Corps of Engineers of the United States and its employees or representatives.

3. That the District Court erred in finding that the Corps of Engineers of the United States had not assumed any obligation to be responsible for the safety of the Vanport residents and their property, and that no duty was imposed upon the United States by the activities of the Corps of Engineers of the United States.

4. That the District Court erred in finding that the seizure of the properties of the Spokane, Portland & Seattle Railway Company and the Union Pacific Railway Company, including the western embankment which failed, was a fiction of the flimsiest kind, and that the seizure did not, in fact, affect in any way the

ownership or control of the said railways or their properties, including the western embankment at Vanport.

5. That the District Court erred in finding that there was no negligence on the part of the Housing Authority of Portland and its agents or employees.

6. That the District Court erred in finding that the United States as owner of Vanport and as landlord of the residents of Vanport had no control over the premises leased to the Vanport tenants, including the appellants, and finding that the United States as landlord and owner of Vanport performed all duties owing from it to the Vanport tenants, including the appellants.

7. That the District Court erred in finding that the agents and employees of the United States and of the Portland Housing Authority assumed no duty, in connection with the flood situation, which they failed to discharge.

8. That the District Court erred in finding that the United States, its officers, agencies, and employees all acted with due and ordinary care in all things connected with the flooding and damaging of property of appellants.

9. That the District Court erred in finding that the responsibility for the safety of property belonging to the tenants at Vanport during the flood period, rested with the individual owners of the property and not with the United States.

10. That the District Court erred in finding that the 1948 Columbia River flood was an act of God.

11. That the District Court erred in finding that the appellants failed to prove any negligence or wrongful act or omission by any employee of the United States and that the appellants suffered damages on that account.

12. That the District Court erred in finding that the doctrine of res ipsa loquitur did not apply in this case.

13. That the District Court erred in finding that the appellants did not rely for the safety of their property on assurances by the United States, its agents or employees.

14. That the District Court erred in finding that the United States had no duty to protect appellants' property and that there was no evidence of negligence or of any wrongful act or omission on the part of any agent or employee of the United States and that the agents and employees of the United States during the flood period were acting in a period of public emergency and were exercising their discretion in that connection, and that no agent or employee of the United States assumed any duty in connection with appellants' property which was not discharged.

15. That the District Court erred in finding that the United States, its agents and employees was not negligent within the meaning of the Federal Tort Claims Act.

16. That the District Court erred in finding that the appellants assumed the risk that they might be damaged by flood waters and that as a consequence there was no liability on the part of the United States.

17. That the District Court erred in finding that the provisions of 33 U.S.C.A. 702 (c) applied to the issues involved in this action.

18. That the District Court erred in granting judgment herein in favor of the appellee and against the appellants.

## SUMMARY OF ARGUMENT

The appellants urge that the trial court committed eighteen errors in its findings, which are set forth in this brief under the heading of Statement of Points to Be Urged. The appellants have grouped these claimed errors under four headings in their argument.

The first argument refers to points 1, 2, 5, 8, 11, 13 and 15 and may be summarized in that the officials of the Army Engineers and the officials of the Housing Authority of Portland, all agents and officials of the appellee, negligently made statements assuring these appellants that the dikes surrounding Vanport were safe. The negligence claimed with regard to these statements that the dikes were safe is that these statements were made recklessly and without any knowledge whatsoever as to the actual condition of the dike that broke. These appellants relied upon these statements made by the officials of the appellee and as a consequence suffered the damages complained of in these actions.

The second argument refers to points 3, 6 and 7 and may be summarized in that the appellee, the United States of America, was the owner in fee of the property

leased by these appellants from the appellee. The appellee owed to these appellants all of the duties owed by a landlord to a tenant, and did not fulfill its duties in that the dike broke and the appellants were flooded out and lost their property as a result thereof, which is the basis of this action. The appellants, as lessees of the government, only had control themselves of their individual apartments, while the landlord retained complete control of all the common areas, including the dikes.

The third argument refers to points 4 and 12 and may be summarized in that the United States government, the appellee herein, by reason of an executive order issued May 10, 1948, had complete possession and control of the dike which failed. And further, the doctrine of res ipsa loquitur applies in this case in that the western embankment which failed was in the exclusive possession and control of the United States, and the breaking of the same was an occurrence which in the ordinary course of things would not happen if those who had its control or management had taken proper care, and there was no participation on the part of the appellants and the appellants suffered damages, these being the requisite essentials which make the doctrine of res ipsa loquitur applicable.

The fourth argument refers to points 9, 10, 14, 16 and 17 and may be summarized in that the appellee raised certain defenses to these actions which were not tenable, the first defense being that of assumption of risk by the appellants. This defense can be of no avail to the appellee, because before that defense is available there must be knowledge by the party who is charged with the assump-

tion of risk, and this was not present in this case. The second defense was that the cause of the damage was an act of God. This was not applicable to the facts in this case because the flood was foreseeable in that the Columbia River had on two prior occasions reached higher heights, and further the actual cause of the damage was not the flood but the negligent statements of the officials of the appellee. The third defense was that the acts of the agents of the appellee were done in a period of public emergency, and this was not applicable because the emergency did not arise until the break of the dike, and the negligence which caused the damage to these appellants occurred prior thereto. The fourth defense was that the flood control act was claimed as being a bar to recovery, and this defense is not applicable because the proximate cause of the damage was the negligent statements of the government officials rather than the flood itself, and further the exceptions to the Federal Tort Claims Act do not include the exception from flood damagent, when there is negligence on the part of a government agent.

## ARGUMENT

**The officials of the Army Engineers and the officials of the Housing Authority of Portland were negligent in giving false assurance of safety to the appellants. This negligence on the part of these officials was the proximate cause of the damage suffered by the appellants.**

(Points to be urged under this heading: 1, 2, 5, 8, 11, 13 and 15 of the above statement of points.)

These cases were instituted under the provisions of the Tort Claims Act of the United States, as amended, under which the United States is liable for injury or loss of property (and for damages in the death cases) caused by the wrongful act or omission of employees of the government while acting in the scope of their office or employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred.

An employee of the government includes officers or employes of any federal agency, and persons acting in behalf of a federal agency, in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

The United States is liable in the same manner and to the same extent as a private individual under like circumstances.

Under the agreed facts as set forth in the pre-trial order, the acts and omissions occurred and the loss of life and property was sustained within the state of Oregon.

Our inquiry, therefore, is properly and necessarily directed to the applicable law of the State of Oregon.

Preliminary to discussion of the substantive law of Oregon, mention should be made of the management situation at Vanport at the time of its inundation. The record shows the fee simple ownership by the United States of Vanport and its rental units. Operating details such as collecting rents, hiring janitors and the like were

being handled immediately by Housing Authority of Portland (HAP) under a management contract (Defendant's Exhibits 50 et sec), between HAP and Federal Public Housing Administration.

The interposition of HAP does not in any way insulate the United States from liability. We here call the Court's attention to the case of Maryland vs. Manor etc. Co. (Ct. of Ap. 4th Circuit, 1949), 176 Fed. (2d) 414. In this case the United States by Federal Public Housing Administration had leased a row of dwellings for housing for defense workers during the war. After the close of hostilities FPHA subleased to a private individual who assigned his lease to a private corporation. A tenant, bitten by an infected rat in the dwellings, died of endemic typhus.

In an action for wrongful death, the United States contended that it was insulated from liability because of its leases, but the court disapproved of this contention in this language:

> "The defendant also contends that it is relieved from liability under the Federal Tort Claims Act, 28 U.S.C.A. § 1346 (b), because the jurisdiction of the District Courts to entertain actions on claims against the United States for injury to property of persons is limited by the statute to negligent or wrongful acts or omissions of an employee of the government acting within the scope of his employment, and an employee is defined in 28 U.S.C.A. § 2671 as a person acting on behalf of the federal agency in an official capacity. It is said that Dugan was in complete charge of the management of the property as an independent contractor and hence Anderson's death was not caused by the negligent act or omission of any employee of the government.

> There is no substance in this contention because the evidence shows that Dugan was subject to the *detailed supervision* of the Public Housing Authority, and that in his contract for the management of the property, he agreed to *be bound by the regulations* issued by the government *in the form of a contract managers' manual,* and by all amendments thereto." (Emphasis supplied.)

In these Vanport cases, the United States was not a mere temporary lesse of the premises, but was the owner in fee of the dwellings, was requiring that its property be managed and operated in accordance with its regulations and the directions of its Managers' Manual, and was dictating the policy as to the kind of persons permitted to occupy its premises, and was directly benefitting from the income.

The decision of Judge Fee in the trial court confirmed the fact that HAP was an agency of the United States, Opinion 109 Fed. Supp. at page 223, and cases cited in note 27 on said page.

We now proceed to a consideration of the substantive Oregon law.

The trial court held, and properly, that the Oregon law is well settled in accordance with common law principle that a landlord has certain definite obligations to a tenant and that the landlord is liable for damage to the property of a tenant caused by negligence of the landlord as to portions of the property over which he retains control, or for negligent maintenance or use of portions of the leased property used by the tenants in common, 109 Fed. Supp. p. 224.

In support of this statement the trial court, in a note, directed attention to the case of Longbotham vs. Takeoka, 115 Or. 608, 239 Pac. 105, 43 A.L.R. 1285, in which case a tenant suffered damage to his goods because the landlord allowed drains to become clogged and rain water invaded the leased premises. In this case the Court said (115 Or. 615-6) that the general rule that the landlord is not bound to repair is not applicable where negligent management of his property not included in the leased portion damages the goods of the tenant, and that, 'In this connection it is believed that a landlord cannot wilfully or negligently burn out or drown out his tenant without being responsible in damages."

Senner vs. Danewolf, 139 Or. 93, 293 Pac. 599, 6 Pac. (2d) 240, was also referred to. This case holds that a landlord is liable to the guests or invitees of his tenants upon the demised premises by reason of a dangerous condition of the premises of which the injured guest or invitee was ignorant. In this case the Court said that the dangerous condition had been brought about and was entirely produced by the landlord, who consequently remains liable for injuries to persons lawfully on the premises, and that if a landlord is guilty of negligence or other wrong which leads directly to the injuries complained of, he is liable.

The trial court refers also to Staples vs. Senders, 164 Or. 244, 96 Pac. (2d) 215, 101 Pac. (2d) 232, in which, in speaking of an owner's liability for personal injuries due to the condition of the premises sustained by an invitee or a tenant, the Oregon Court used the following

language (164 Or. p. 263):

> "As to defects in the leased premises existing at the time of the demise it is generally held that even then the landlord is not liable for injuries caused by them to his tenant, or one standing in the tenant's right, unless they are so hidden that the lessor could be regarded as under an obligation to notify the lessee of their existence. 1 Tiffany, *ibid,* 563, § 86d, 649, § 96a; 16 R.C.L., *ibid.* 1068, § 588; 36 C.J., *ibid,* 204, § 874. It has been held in this state, however, that where the landlord creates a nuisance upon his premises and then demises them, and an invitee of the lessee is injured as the result, the landlord remains liable for the consequences of the nuisance as the creator thereof, notwithstanding, apparently, that the dangerous condition was known to the lessee as well as to the landlord: *Senner v. Danewolf,* supra; see 16 R.C.L., *ibid,* 1069, § 589."

In addition to these authorities, we direct attention to the case of Garrett vs. Eugene Medical Center, 190 Or. 117, 224 Pac. (2d) 563. This was a case in which the plaintiff, a tenant, recovered for injuries sustained because of unsafe condition of premises leased from defendant. At 190 Or. 127 appears the following statement:

> "In *Pritchard v. Terrill,* decided October 3, 1950, 222 P. 2d 652. *Lyons v. Lich,* 145 Or. 606, 28 P. 2d 872, *Massor v. Yates,* 137 Or. 569, 3 P. 2d 784, and *Longbotham v. Takeoka,* 115 Or. 608, 239 P. 105, the landlord had retained at least partial control over the part of the premises which, upon becoming defective, caused injury. In all instances, judgment for the plaintiff was affirmed."

In Restatement of the Law in the volume on Torts, Section 361, it is stated:

> "A possessor of land, who leases a part thereof and retains in his own control any other part which is

necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care (a) could have discovered the condition and the risk involved therein, and (b) could have made the condition safe. Comment: a. The rule stated in this Section applies irrespective of whether the lessee or his licensees coming in his right upon that part of the land leased to him, know or could, by the exercise of reasonable care, discover the dangerous condition maintained by the lessor upon that part of the land maintained within his own control."

In Dalehite vs. United States, ..... U.S. ....., 73 S. Ct. 956, decided June 8, 1953, the Supreme Court of the United States divided 4 to 3 upon the question of the liability of the United States under this act for damages sustained as a result of the explosions occurring at Texas City, Texas, on April 16 and 17, 1947. The majority opinion says that the Federal Tort Claims Act was an off-spring of a feeling that the government should assume the obligation to pay damages for the misfeasence of employees in carrying out the government's work. It says further that the Act is to be invoked only on a negligent or wrongful act or omission of an employee and requires a negligent act, and liability does not arise solely by virtue either of the ownership by the United States of an inherently dangerous commodity or property, or of its engaging in an extra hazardous activity.

Accepting as we must this statement of the applicability of the Federal Tort Claims Act, we eliminate

from discussion in this brief the well-known doctrine of absolute liability which had been imposed by Judge Fee upon the United States in the leading case of Ure vs. United States, 93 Fed. Supp. 779, and which was urged by these appellants before Judge Fee as a ground of liability in these cases, and base our case upon the negligence of employees of the government.

The negligence of the employees of the government, while acting within the scope of their employment. consisted in giving to these appellants, carelessly under the existing circumstances, unwarranted assurances of the safety of their lives and property.

In 65 C.J.S. at page 428 the rule respecting liability for false statements negligently given is stated as follows:

> "A false statement negligently made may be the basis of a recovery of damages for injury or loss sustained in consequence of a reliance thereon, the American rule in this respect being more liberal than the law in England. In order that such liability may exist, it is necessary that the relationship of the parties, arising out of contract or otherwise, be such that one has the right to rely on the other for information, that the one giving the information should owe to the other a duty to give it with care, that the person giving the information should have, or be chargeable with, knowledge that the information is desired for a serious purpose, that the person to whom such information is given intends to rely and act on it, and that if the information is erroneous, the person to whom it is given will be likely to be injured in person or in property as a result of acting thereon."

In Restatement of the Law, Torts, at page 840 appears the following:

> "§ 310. Conscious misrepresentation involving risk of bodily harm. An actor who makes a misrepresentation of fact or law is subject to liability to another for bodily harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other or a third person which involves an unreasonable risk of bodily harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes."

Under Comment (b) under this section of Restatement it is stated that this rule is applicable to misrepresentations upon which the safety of the person or property of another depends, and the following illustration is given:

> "A tells B that he has tried the ice on a certain pond and found it thick enough for safe skating knowing that he has not tried it and knowing nothing of the condition of the ice, which in fact is dangerously thin although not so appearing. B, in reliance on A's statement, attempts to skate upon the pond and falls in, catching a severe cold. A is liable to B."

The evidence clearly shows that the Army Engineers assured the officials of Housing Authority of Portland concerning the safety of the premises and also that the officials of Housing Authority of Portland, on their own volition, advised the tenants of Vanport concerning their safety, upon which the tenants, including the appellants, relied and acted.

Under the Oregon law the landlord is not only under the duty of keeping the premises reasonably safe, but also of giving suitable warning to the tenants and invitees.

In Massey vs. Seller, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553, an action in tort arising because of alleged negligence in maintaining an elevator shaft, the Court said (45 Or. p. 271):

> "It may be assumed that it was the duty of the defendants to warn plaintiff of the danger or apprise him of the unguarded elevator shaft when inducing him to enter the shipping room to make the exchange or transfer of the fruit jars, that it was a duty they owed him, and that they were negligent in the nonobservance of it."

Boardman vs. Ottinger, 161 Or. 202, 88 P. (2d) 967, was an action against the defendants, doing business as Jackson Hot Springs, to recover for injuries sustained while plaintiff was a patron in the premises of the defendants. In speaking of the necessary warning the Court said (161 Or. pp. 206-7):

> "From the Restatement of the Law of Torts, § 348, we quote:
>
> 'public utility or other possessor of land who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the land for such a purpose for bodily harm caused to them by the accidental, negligent or intentionally harmful acts of third persons or animals if the possessor by the exercise of reasonable care could have (a) discovered that such acts were being done or were about to be done, and (b) protected the members of the public by (i) controlling the conduct of the third persons, or (ii) *giving a warning adequate to enable them to avoid the harm* without relinquishing any of the services which they are entitled to receive from the public utility.'
>
> "That statement is in accord with our decisions: *Peck v. Gerber,* 154 Or. 126, 59 P. (2d) 675, 106

A.L.R. 996; and *Hill v. Merrick,* 147 Or. 244, 31 P. (2d) 663. See also *Curtis v. Portland Baseball Club,* 130 Or. 93, 279 P. 277, and *Johnson v. Hot Springs Land & Imp. Co.,* 76 Or. 333, 148 P. 1137, L.R.A. 1915F, 689.

"Accordingly, since the defendants owed the above duty, their argument concerning a responsible, independent agency (by which term they refer to the ballplayers) is without merit, for it was their duty to protect the plaintiff against injury from such an agency if, through the exercise of reasonable care, they could have discovered the wrongful conduct and taken the appropriate course."

Briefly, the pertinent facts involved regarding the situation at the time are these:

There were 16,000 people living within the boundaries of Vanport.

Vanport, together with all the buildings thereon, was owned in fee simple by the government and was being maintained and operated by the government, and the government was in the possession and control and receiving the rentals the same as any other private landlord.

On May 30, 1948, flood waters of the Columbia River, to a depth of 29.6 feet above mean high water, were pressing against the north and south dikes and against the western railroad fill; this was the highest water that had ever been against any of the dikes, and they were all leaking badly; the situation was recognized as so serious that the Army Engineers and Housing Authority of Portland were patrolling, sandbagging and trying to keep track of the dangerous conditions as they

continued to increase; the Red Cross, the sheriff's office, the Oregon State authorities and the railroad officials were seriously concerned about the safety of the people residing in Vanport; it is unquestioned that the situation was dangerous, as is graphically shown by the remarks of the trial judge during the course of the trial during the cross-examination of Mr. Taylor, who was Assistant Director of Management of HAP and in charge of patrolling the dikes:

> "THE COURT: If nobody told you Vanport was in danger, what was this seriousness of the situation that was discussed at the meeting?
>
> . . .
>
> THE COURT: Nobody had told you that Vanport was in danger with 30 feet of water around it, did they?"

There is no question whatever but that the Army Engineers and the officials of HAP were utterly and completely ignorant and uninformed with respect to the foundation, composition, interior filling, structural strength and general stability of the western embankment, generally referred to in the evidence as the railroad fill. The western embankment, according to the agreed facts, was not built by the railroad companies to be, and was never designed from an engineering point of view as, a water repellent structure, but was simply a support for the railroad tracks. Apparently this agreed fact was not taken into consideration by the Army Engineers or by the officials of HAP at the time the water was cresting at an expected elevation of 32 feet surrounding Vanport.

Yet, on the several days prior to the break in this western embankment, the officials of the Army Engineers and the officials of HAP repeatedly assured these appellants and other residents of Vanport of their safety. This assurance was by radio release, by releases to newspapers, by telephonic responses to inquires through the central switchboard and by all the other generally recognized means of communication.

Reference has heretofore been made in the statement to the pages of the transcript and to the exhibits substantiating these communications and unwarranted assurances of safety. We direct the Court's attention at this point, however, to the following:

The Oregon Journal of May 28, 1948, quoted the Army Engineers as stating:

> "There is nothing at present to indicate that the dikes will not hold, but every precaution is being taken."

The Oregon Journal of May 29, 1948, contained the heading:

> "Uneasy Folk Assured Area Safe,"

and the further statement

> "The Columbia River's expected crest of 30 feet will not endanger Vanport City, according to Harry D. Jaeger, General Manager . . . The protecting dikes around Vanport City area are a full 33 feet high and are ample to protect the community of approximately 25,000."

The Sunday morning, May 30, 1948, Oregon Journal contained, among others, the following:

> "Residents of Vanport City have been reassured that no danger exists for them."

In another column this paper said:

> "No Vanport danger but preparations made—'in case'—While Col. O. E. Walsh, District Army Engineer, gave reassurances Saturday afternoon that Vanport City is in no danger from flood waters, . . ."

The Oregonian, May 29, 1948, contained this statement:

> "Neither is Vanport City in any foreseeable danger from a 30 foot flood crest, Harry D. Jaeger, General Manager, declared Friday, in an effort to quiet fears for that locality."

In the Sunday morning Oregonian, May 30, 1948, appeared the following:

> " 'The Engineers have assured us our protection is adequate at the present flood prediction,' Jaeger said. 'We feel that there is no cause for worry, but we are not overlooking what might occur. We have made plans with the American Red Cross for quick evacuation of Vanport if the river goes higher than expected.' "

In addition to the responses which the telephonic operators were instructed to make, assuring the residents of Vanport of their safety, the radios in their news broadcasts and other items carried the assurances of the Army Engineers and the officials of HAP as to the safety of the Vanport residents.

Late Saturday, May 29, 1948, the Housing Authority of Portland prepared and had placed early Sunday morning in each and every apartment the following mimeographed bulletin:

> "TO THE RESIDENTS OF VANPORT
> Read this carefully and keep it in case you need to refer to it.

The flood situation has not changed since the prediction made last Thursday that the highest water would come next Tuesday, that the dikes were high enough and strong enough to withstand the crest, and that barring unforseen developments VANPORT is safe.

However, the Housing Authority is taking every possible precaution to protect the personal safety of every Vanport resident in the event of emergency. The plan outlined is as follows:

1. In the event it becomes necessary to evacuate Vanport, the Housing Authority will give the warning at the *earliest possible moment,* upon the advice of the U. S. Army Engineers. Warning will be by siren and air horn blown continuously.

2. Sound trucks will give instructions on what to do. Those instructions briefly are as follows:

A. Don't get panicky! You have plenty of time. Take such valuables as money, papers, jewelry. Wear serviceable clothing, and pack essential personal belongings and a change of clothing in a small bag. *Do not try to take too much.* Turn off lights, stoves, close windows, lock the door.

B. If you have a car, observe traffic regulations. Carry as many people as you can.

C. If you haven't a car go toward DENVER AVENUE, or the RAILROAD EMBANKMENT, which ever is closest. Portland Traction buses will operate in the project or on Denver Avenue, depending on conditions, to take persons to places of emergency shelter. Upon arrival at shelter, the Red Cross will assume responsibility for registration and for emergency food, shelter, and clothing. The county health department will provide emergency medical care. Cases of sickness, old age, or disability where special assistance will be necessary in case of evacuation should be reported now to the Sheriff's Office. Such cases, if they can conveniently do so,

are encouraged to leave Vanport now for the next few days.

Also persons who *for any reason* are leaving Vanport to be away for several days are urged to register at the Sheriff's Office before leaving. This will help to answer inquiries from anxious friends and relatives who do not know where you are.

REMEMBER:
DIKES ARE SAFE AT PRESENT
YOU WILL BE WARNED IF NECESSARY
YOU WILL HAVE TIME TO LEAVE
DON'T GET EXCITED!"

Nevertheless, shortly after 4:00 P.M. on Sunday, May, 30, 1948, this railroad fill, of the nature, structure and contents of which the Army Engineers and the officials of the Housing Authority of Portland had no knowledge or concerning which they made no investigation, disintegrated, and Vanport was inundated and the household goods, belongings and effects of these appellants were irretrievably lost.

The trial court in its opinion has correctly stated that under the law of Oregon there are three prerequisites for recovery against a private person. There must have been (1) a duty incumbent upon the defendant, (2) a breach of that duty by defendant, and (3) injury and damage resulting proximately from the breach of duty. (109 Fed. Supp. at p. 218).

We have demonstrated, both from the opinion in this case (109 Fed. Supp. p. 224) and from the several Oregon cases, that the United States as owner of these premises and as the landlord of these appellants owed the duty to them not to drown them out and to give

them warning; and we have demonstrated that instead of giving warning, the officers and agencies of the United States recklessly and without knowledge of the stability of the railroad fill gave unwarranted assurances of safety; and of course the loss and damage was admitted, except (as to any appellant) as to the exact amount.

The trial court was consequently in error in determining that the government was not liable to these appellants.

**The United States, in its capacity as the landlord of the appellants, and by its retaining control of the area in question, owed a duty to its tenants, including the appellants, to keep the area in question safe, or at least not to mislead the appellants as to safety, and further the United States acting through the Army Engineers and Housing Authority of Portland assumed this duty, which they failed to perform.**

(Points to be urged under this heading: 3, 6 and 7 of the above statement of points.)

In the opinion of the trial court there appears this statement or finding (109 Fed. Supp. 222):

> "Since its agents took no care to assure themselves of the composition and structure of the western dike which broke, it is urged negligence was proven."

Standing by itself and in the absence of other circumstances, failure of the Army Engineers at a time of high water to determine the composition of a railroad fill with the view of determining whether the fill could

be relied upon as a dike or water repellent structure certainly would not constitute negligence.

The fundamental error of the trial court, however, lies in failing to consider the entire legal and physical situation as one integrated whole. Throughout the opinion an individual segment of the situation is discussed as though it had no relationship with the other segments.

But we are concerned with all of the facts as one integrated whole. The finding that the agents of the United States took no care to assure themselves of the composition and structure of the western dike which broke must necessarily be coupled and considered with the other fact, that then and there the United States was providing presumably safe housing accommodations for these appellants and was collecting their money and was assuming to advise and protect them. The description by Judge Fee of this assumption cannot be improved on (109 Fed. Supp. p. 225). After referring to the administrative and executive employees of Housing Authority of Portland, the Judge stated:

> "The chief criticism which can be directed at this group was that they assumed to be omniscient and radiated an atmosphere of confidence which the situation did not justify. Instead of directing the tenants to do their own thinking and decide on their own what the safety of their families and themselves required, they did indicate that the kind, paternalistic government would take complete direction of its children and protect them.
>
> "In this these individuals were not entirely blamable. There was a large file of directives from the national capitol sent to all the housing projects in the country, including Vanport, which burningly

> reflected the same attitude. The thesis seems to be that the people in housing projects are like children; they really do not know what they want or what to believe; if they were adult thinkers, they would wish and desire those things which are best for them; since they do not know what the things which are best for them are, the designated managers of the housing project should accept the challenge and give them guidance and directions, all in accordance with the mandates from above, contained in the housing regulations."

Attention has heretofore been directed to the unwarranted assurances of safety and many of the details thereof.

The complete lack of knowledge of the composition and stability of the western embankment, and the ownership, maintenance and control of Vanport and its buildings, and the paternalistic assumption of the care and safety of these appellants, and the unwarranted assurances of safety, and the ensuing loss to these appellants, are all elements making one entire situation, and no one element can be divorced from the remainder in a determination of the proper outcome of this litigation.

In divorcing each element from each other element, the trial court committed a fundamental error.

A further error of the trial court lies in the conception of this series of cases as sounding in contract. It is surprising that this concept should run through the opinion, but it does. It is stated (109 Fd. Supp. 225) that a person owning a house in an exposed locality takes the same risk as a tenant would had the tenant been owner, and that there is no protection against flood except by taking

out a contract of insurance. Again it is stated (109 Fed. Supp. 226) that the "Good Samaritan" doctrine is the doctrine of "contract clause in the leases." Again it is stated that there "is here no contract or guarantee."

The appellants in these cases do not rely upon any provision of their leases with the United States, nor upon any insurance policies which the United States may have issued or procured, and this matter is not one of contract in any respect whatsoever. There was a duty under the law of the State of Oregon, and that duty was breached by employees of the government in the negligent and unwarranted assurances to these appellants, and as a proximate result they sustained their losses.

And that in short is the case of the appellants.

**The doctrine of res ipsa loquitur applies in this case.**

(Points to be urged under this heading: 4 and 12 of the above statement of points.)

The trial court found that the seizure of the properties of the S. P. & S. Railway Company and the Union Pacific Railway Company, which included the western embankment which failed, was the fiction of the flimsiest kind and that the seizure did not in fact affect in any way the ownership or control of the said railways or their properties, including the western embankment that failed. The appellants assert that this finding by the trial court was in error.

It was stipulated in the pre-trial order that the President of the United States issued Executive Order num-

ber 9957, effective as of noon on May 10, 1948, the date of said order (P.O. 75, 79). This Executive Order provided that the possession, control and operation of the transportation system listed in said order, including the railroad companies which owned the embankments in question, were taken over by the United States on May 10, 1948, through the Secretary of the Army. This order further provided that at the time of said taking, all properties under the order, which included the embankment which failed, shall be conclusively deemed to be within the possession and control of the United States without further act or notice (13 F.R. 2503).

Under this Executive Order of the President of the United States, the western embankment that failed was in the exclusive possession and control of the United States at the time of the failure.

The trial court further found that the doctrine of res ipsa loquitur did not apply in this case and the appellants urge that this finding by the trial court was an error.

Referring first to the western embankment that failed, the facts which bring the instant case within the doctrine of res ipsa loquitur are, briefly, that the western embankment, by reason of the Executive Order, was in the exclusive possession and control of the appellee. Further, the occurrence was such as in the ordinary course of things would not happen if those who had its control or management used proper care. Further, there was no participation on the part of the appellants, and the appellants suffered damages. All of the essential elements

of the doctrine of res ipsa loquitur appeared in the facts of this case. 38 Am. Jur., pp. 989-992. An additional element in this case is the fact that the appellee did not at the trial give any reasonable explanation for the cause. As a matter of fact, the district engineer, General Walsh, who was in charge of the district at the time of the break, testified that he did not know or have any opinion as to why the railroad fill failed.

The contentions of the United States in this case, with respect to the railroad fill might have been lifted from the contentions of the defendant in *Suko v. Northwestern Ice Co.,* 166 Or. 557, 113 P. (2d) 209, where a water tank burst damaging plaintiff, and where the defendant argued in support of motions for non-suit and directed verdict that "the evidence fails to disclose any negligence attributable to it in connection with the bursting of the tank. It further asserts that if any negligence was proved it was referrable to the original construction of the tank."

The Supreme Court of Oregon found that the premises on which the tank was located was in the exclusive possession and control of the defendant, brushed aside the contentions of the defendant, and stated that the liability of the defendant did not depend on negligence in construction, but upon negligence in not keeping the water confined. That the negligence was proved by the bursting of the tank and that the rule of res ipsa loquitur applied.

In *Gow v. Multnomah Hotel, Inc.,* 191 Or. 45, 224 P. (2d) 552, 228 P. (2d) 791, decided in 1951, the Supreme

Court of Oregon laid down the general rule that this doctrine is as stated in Am. Jur., supra. Under this decision the law in Oregon is that the rule, when applicable, gives rise to an inference of negligence.

So far under this point we have discussed the doctrine of res ipsa loquitur being applied as to the breaking of the dike itself. The appellants urge that this same rule applies to the negligence of the officers of the Housing Authority of Portland and the United States Army Engineers in giving information as to the safety of the dike in question. It is admitted that the information given by the officials of the appellee was wrong in that the dike did fail. The giving of this information was in the sole control of the agents of the appellee. There certainly was no participation in the giving of this information on the part of the appellants. There can be no argument but what the appellants suffered damages by reason of this wrong information being given by the officers and officials of the appellee. Under the doctrine of res ipsa loquitur the appellee should have given some explanation for these misstatements but none was forthcoming during the trial of this action.

**In the trial of this cause the appellee asserted the defenses of assumption of risk by the appellants, that the cause of the damage was an act of God, that the acts of the agents and employees of the United States were done in a period of public emergency and that the provisions of 33 U.S.C.A. 702 (c) apply to the issues involved in this action. None of these defenses, although adopted by the trial court, are tenable.**

(Points to be urged under this heading: 9, 10, 14, 16 and 17 of the above statement of points.)

The appellants urge that the District Court committed an error when it found that the appellants assumed the risk that they might be damaged by flood waters and that as a consequence there was no liability on the part of the United States. It is recognized that one who voluntarily assumes the risk of injury or damage from a known danger is barred from recovery. This principle is recognized in negligence cases. However, before this principle applies, the danger must be known. The appellants in this case did not have knowledge of the danger; that is, they did not have knowledge or any reason to believe that the dike would break. They had been advised by their landlord, the United States of America acting through the officials of the Army Engineers and the officials of the Housing Authority of Portland, that the dikes were being carefully watched and supervised and that if any dangers did appear, they would receive an ample warning. These appellants acted as reasonable men in relying upon the advice given to them by the United States. These appellants had no reason whatsoever to believe that the Army Engineers saw fit to say that a structure, in this case the embankment that failed, was safe, when as a matter of fact that opinion was given without any knowledge whatsoever as to the actual condition of the embankment that failed (38 Am. Jur. p. 845.)

This same defense was raised in the case of *State of Maryland v. Manor Real Estate and Trust Company,* 176 F. (2d) 414, U.S.C.A. 4, decided August 2, 1949.

This was a suit under the Federal Tort Claims Act, and the court answered this defense at page 418, as follows:

> "The defendant also contends that recovery must be denied because the deceased assumed the risk of injury when he remained in the apartment after he discovered that the cellars were overrun with rats. Reliance is placed upon such decisions as Thompson v. Clemens, 96 Md. 196, 53 A. 919, 60 L.R.A. 580, where it was held that a landlord who has agreed to make repairs to leased premises, which are not apparently urgent and who has no reason to suppose a serious injury will result from his failure to make them, is not liable to respond in damages for personal injuries sustained by the tenant in consequence of the failure to repair; and that the tenant of such a landlord who is aware that the leased premises are in dangerous condition and chooses to remain on the premises and suffers an injury from the defect, would ordinarily be guilty of contributory negligence, barring recovery. That ruling, however, is not pertinent in this case. The Andersons were not entirely free to leave the premises because of the difficulty of obtaining living accommodations in 1946 which the Authority's enterprise on North Calvert Street was designed to alleviate. Moreover, there is no evidence that the Andersons were aware of the danger of typhus infection from the rat infested premises, but on the contrary there was positive evidence that Mrs. Anderson was not aware of this risk until her husband was taken sick. The tenants were entitled to exercise the right of occupancy conferred by their lease and to demand that the landlord perform the duty of keeping the reserved portion of the premises in safe condition for their use. Under these circumstances, there was no assumption of the risk on their part. See, Restatement of Torts, § 893."

The appellants further urge that the trial court committed an additional error in finding and holding that

the cause of the appellants' damage was an Act of God. The first fallacy in this finding is that the actual cause of the appellants' damage was the negligence of the officials of the Army Engineers and of the officials of the Housing Authority of Portland, when they informed these appellants that all the dikes, including the one that broke, were safe, and wouldn't break. If instead of so informing these appellants, these officials being agents of the appellee had informed that appellants that as far as the western embankment, which failed, was concerned they had no knowledge whatsoever as to the materials used in the construction of the same; they had no knowledge whatsoever as to the nature of the bottom upon which the fill was constructed; they had no information whatsoever as to the manner of construction, but that all they did know was the size of the embankment, and the fact that it had been there since around 1918. Further, that the embankment as far as experience was concerned had only withstood water pressure from the depth of 27.7 feet, and the depth of the water it was going to have to withstand was 3.1 feet higher. If these appellants had received this accurate information instead of the wrong information, which they did receive from the agents of the appellee, in all probability these appellants would have removed their property and would not have suffered the damages of which they are complaining. This giving of wrong information is clearly not an Act of God, but is a negligent act of agents of the appellee.

An Act of God is an unusual, extraordinary, sudden, and unexpected manifestation of the forces of nature,

which man cannot resist (38 Am. Jur. page 649). The high water in the instant case was forseeable and had been predicted by other agents of the appellee, namely, the United States Weather Bureau (P.O. 53). Further, the Columbia River had on prior occasions reached higher elevations, namely, in 1876 and 1894 (P.O. 55). Something which has occurred previously is in all probability likely to occur again and therefore is forseeable.

The defense of Act of God is not tenable. It is recognized, and it is a general rule, that when the negligence of a person concurs with an ordinary flood, storm or other natural force, or with a so-called Act of God, and causing damage, the party guilty of such negligence will be held liable for the injurious consequences, if the damage would not have happened except for that person's failure to exercise care (38 Am. Jur. 719). In this case we do have the Columbia River reaching a high stage, although it had reached higher stages before, but we have coupled with the high water the negligent statements of agents and employees of the appellee, and under the general rule just stated, removes any possible defense of a so-called Act of God.

The appellants further urge that the trial court committed error in finding that the agents and employees of the United States, during the flood period, were acting in a period of public emergency and were exercising their discretion in that connection, and that there would be no liability for negligence by the government officials while acting under a public emergency. This defense is very easily answered in that the actual emergency arose when the embankment failed and the negligent acts by the

employees and agents of the appellee were prior to the public emergency. These acts being the giving of wrong information, not founded upon fact, and not taking steps to investigate the dike in question, or to strengthen the dike so it would withstand the pressure applied to it.

The appellants further urge that the trial court committed error in finding that the Flood Control Act, namely, 33 U.S.C.A. 702 (c) applied to the facts of this case, and thus prevented recovery by these appellants. This section, relied upon by the court, appeared in the Flood Control Act of 1928 (45 Stat. 534). This same provision was retained by Section 8 of the 1936 Flood Control Statute (49 Stat. 1570, 1596).

The Federal Tort Claims Act, under which these actions have been brought, was passed in 1946, 28 U.S.C.A. 1346 (b), 2680. The last quoted section being the so-called exceptions to the Federal Tort Claims Act. In the exceptions there is no provision for excepting damages by reason of a flood and the Federal Tort Act was passed subsequent to the flood statute relied upon by the court. It is interesting to note that in the latest expression by the Supreme Court of the United States, in the case of *Dalehite v. United States,* ..... U.S. ..... , 73 S. Ct. 956, decided June 8, 1953, that the Supreme Court in its majority opinion discusses the exceptions to the Federal Tort Act and calls particular attention to one paragraph in the Committee Reports, being cited in Note 21 of said opinion, and this Committte Report states, in referring to the exemption of a discretionary act or function, that this is a highly important exception intended to preculde any possibility that the Tort Claims Act

might be construed to authorize suit for damages against the government growing out of an authorized activity such as a flood control or irrigation project, where no negligence on the part of any government agent is shown. This Committee Report shows conclusively that it was the intent of Congress that if there was negligence on the part of a government agent, in connection with a flood control project, then the exception would not apply and the government would be liable.

Another conclusive reason why the provision of the Flood Control Act, relied upon by the trial court, does not apply to the instant case, is that the actual cause of the damage to these appellants was not for damage from the flood but their damage resulted from the negligent statements made by the agents and employees of the appellee.

For the reasons given above, none of these defenses urged by the appellee and adopted by the trial court as being a bar to recovery by these appellants, are well founded in law or fact in the instant cases.

## CONCLUSION

The judgment of the District Court is wrong and should be reversed.

Dated this 12th day of October, 1953.

Respectfully submitted,

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## APPENDIX

28 U.S.C.A., §1291.

The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C.A., § 1346(b).

Subject to the Provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A., § 2401 (b).

A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of

enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

28 U.S.C.A., § 2671.

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency, in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C.A., § 2680.

The provisions of this chapter and Section 1346 (b) of this title shall not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company.

# No. 13,866

IN THE

# United States Court of Appeals

## For the Ninth Circuit

---

SOLON B. CLARK, JR., and GERALDINE A. CLARK,

*Appellants,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

## BRIEF FOR THE UNITED STATES.

---


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No. 13,866

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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SOLON B. CLARK, JR., and GERALDINE A. CLARK,

*Appellants,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR THE UNITED STATES.

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### JURISDICTION.

District Court jurisdiction of these claims depends upon the Tort Claims Act, 28 U.S.C.A. 1346(b). Jurisdiction in this Court depends upon 28 U.S.C.A. 1291.

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### STATEMENT OF THE CASE.

Between 4:00 and 4:30 P.M. on the afternoon of May 30, 1948, the western embankment at Peninsula Drainage District No. 1 in Multnomah County, Oregon suddenly failed under pressure of Columbia River flood waters. Within an hour, Vanport, a war housing project owned by the United States and located

in the drainage district, was completely inundated. Nearly all the Vanport residents, some 15,000 in number, were successfully evacuated. Fourteen or fifteen lives were lost, however, and considerable personal property belonging to the Vanport tenants was destroyed.

In due course, some 3,000 of the Vanport residents filed approximately 600 actions in the Oregon District Court asserting, under the Tort Claims Act, that the United States was responsible for the flood loss and asking damages of more than $6,000,000. When the period of limitations had expired, twenty of the cases, including this action, were selected as test cases on the liability issue and consolidated for trial. Counsel for the parties, after extensive discovery proceedings, prepared under the direction of the District Court a lengthy pretrial order defining the issues and stipulating to many of the relevant facts. The consolidated cases were then tried. Approximately 70 witnesses appeared and about 215 exhibits were introduced in evidence. Briefs were filed, the cases argued, and in due course the District Court announced its opinion in favor of the United States. Findings of fact and conclusions of law were prepared and filed and a judgment for the United States entered in this case and the nineteen cases consolidated with it.

Shortly before trial a stipulation dated August 6, 1951 was signed by the attorneys for all the Vanport litigants. This stipulation provided in detail the effect to be given in the other Vanport cases to any judgment thereafter entered in the twenty consoli-

dated cases. In general the theory of the stipulation was that the Vanport cases, other than the consolidated cases, would remain inactive on the docket of the District Court pending a final determination as to the liability of the United States. After the opinion below had been announced, the District Judge suggested that findings and judgment based upon this opinion be entered in all the 600 Vanport cases rather than in the consolidated cases alone. Pursuant to that suggestion the stipulation of August 6, 1951 was modified by a supplemental stipulation dated November 17, 1952 to provide that the findings and judgment in the consolidated cases should be deemed to be entered in all the cases. Furthermore, findings and judgment in summary form were physically signed and filed in each of the 600 cases.

This appeal is from a single judgment, the judgment entered in the twenty consolidated cases. The notice of appeal proceeds, however, on the theory that all the Vanport litigants have an interest in the judgment and it names as interested persons most of the Vanport plaintiffs. Since, however, there has been no appeal from the judgments signed and entered in the Vanport cases other than the twenty consolidated cases, it is by no means clear that any of the cases except the twenty consolidated cases are now open.

Appellants filed and this Court granted a motion to dispense with printing of the record. The references in this brief are, therefore, to the typewritten record (Tr.) and to the typewritten copy of the pretrial order (Pto.). Most of the pretrial order, to-

gether with a preliminary opinion of the District Court on pretrial procedures, is reported at 13 F.R.D. 340. The opinion below on the merits is reported at 109 F. Supp. 213. The findings and conclusions of law entered in the consolidated cases are printed as an appendix to this brief.

The issues before this Court are essentially, first, whether there is evidence in the record to support the no-negligence findings of the District Court and, second, whether the conclusions below on the legal issues are supported by the precedents. The Government believes that the record contains overwhelming proof of due care and that the legal principles announced below are thoroughly settled and everywhere accepted. Moreover, since the date of the District Court judgment, the Supreme Court has decided *Dalehite v. United States,* 346 U.S. 15 (1953) and that decision makes it plain that, leaving everything else aside, the District Court had no jurisdiction under the Tort Act to allow these claims.

**1. Vanport and Peninsula Drainage District No. 1.**

Vanport, where appellants were living on May 30, 1948, was constructed in 1942-3 by Kaiser Company, Inc. and its subcontractors (Pto. 30) to provide housing for persons engaged in war work in or near Portland, Oregon and particularly for employees of three shipyards in that area operated by Kaiser (Pto. 29). The project was built at Government expense on land belonging to the United States (Pto. 28). The cost to the Government for the land, the housing

and the furnishings was $25,750,000 (Pto. 32). Vanport was a large project—in truth, a small city. It provided sufficient housing for 38,000 people (Pto. 51). It had churches (Pto. 50), hospital facilities (Pto. 50), a fire department (Pto. 50), an independent water supply (Pto. 50), sewage disposal and storm drainage systems (Pto. 50), elementary schools under an Oregon school district (Pto. 50) and a resident representative of the Multnomah County Health Department (Pto. 50). Police operations were in charge of the Multnomah County sheriff, who maintained a Vanport office staffed with 25 men (Pto. 50).

Upon completion of construction, Vanport was leased by the United States to the Housing Authority of Portland (Exs. 349, 350, 351). This lease arrangement remained in effect until Vanport was destroyed by the flood. Under the lease the profit or loss from the operation of the property was profit or loss to the United States (Ex. 351) but selection of the tenants (Pto. 52) and the day to day management of the property was entirely in the hands of the Housing Authority and its employees (Pto. 47). The Housing Authority of Portland (HAP) was created December 11, 1941 by resolution of the City Council of Portland, acting under the Oregon State Housing Authorities Law (Pto. 34). HAP is a large organization operating a number of projects (Pto. 36; Ex. 351). On May 30, 1948 it had 675 employees (Pto. 48) working under the direction of Commissioners appointed by the Portland mayor (Pto. 47, 34).

Vanport was located within Peninsula Drainage District No. 1 (Pto. 5), a district organized about June 1, 1917 under the Oregon Drainage District Laws (Pto. 9) for purposes of reclamation and flood protection (Ex. 323). District No. 1 is situated on the outskirts of Portland, approximately 106 miles above the mouth of the Columbia River and approximately four miles above the confluence of the Columbia and Willamette rivers (Pto. 5). The district lies on the south shore of the Columbia and between the river and Oregon Slough (Pto. 5). On the west are lands subject to flood (Pto. 5); on the east, another drainage district known as Peninsula Drainage District No. 2 (Pto. 5). Except for a strip of high ground along the river, most of the district, consisting of 951 acres (Pto. 6), is below average flood height in the Columbia and in the absence of protecting embankments would be inundated during all flood stages of the river (Pto. 6).

In June 1917 when the district was organized, certain railroad fills on the west were already in existence and they became the western embankment of the district (Pto. 9). On the east the highway fill supporting Denver Avenue had already been constructed and it became the eastern embankment of the district (Pto. 9). The district itself constructed levees on the north and south. Those levees were built to a mean sea level (m.s.l.) elevation of thirty feet (Pto. 9) and designed to provide protection against a flood equal to that of 1876, then the second highest of record (Pto. 10). Funds for the work were obtained by levy-

ing assessments against the land within the district (Pto. 10). The district now has and ever since its organization has had power to arrange assessments to provide funds for the construction or maintenance of levees (Pto. 10).

The district work on the north and south levees was completed in 1918 (Pto. 9). In 1934 Congress was requested to provide additional flood protection for the Columbia River Basin (Pto. 11). In accordance with customary procedures,[1] Congress directed the Secretary of War to make a preliminary survey of the river and its tributaries (Pto. 11; 48 Stat. 954). The Corps prepared a report and by Section 5 of the Flood Control Act of 1936 (49 Stat. 1572), Congress directed the Chief of Engineers to raise and strengthen the north and south levees of District No. 1 (Pto. 11). Pursuant to this direction the Corps built a new river-

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[1]General O. E. Walsh, who was in charge of the Portland District of the Corps of Engineers in 1948, described those procedures:

> "The local people who feel that they have a flood problem they want to have solved apply to their representatives in Congress to have a study made, and Congress by either of two methods: One, a special legislative act for a new study, or a motion on the part of the Public Works Committee of either the House or the Senate, in case of a review study, directs the Chief of Engineers to make a study and report to the Congress what should be done to solve the problem. We hold public hearings to find out what the desires of the local people are, and then prepare a report and submit it to the Chief of Engineers. It is reviewed by the Board of Engineers of Rivers and Harbors. Their report, the District Engineer's report, and the Chief of Engineer's report, is then submitted to the House of the Congress that asked for it and hearings are held before the Public Works Committee. Then both Houses of the Congress act on it as they do any ordinary legislation, and it becomes law if passed by both Houses and signed by the President" (Tr. 808-9).

front concrete wall and reconstructed the earthen embankments (Pto. 12). The work of the Corps was completed in 1941 (Pto. 13) and control of the levees was formally surrendered to the district on September 15th of that year (Pto. 13; Ex. 327). The obligation to maintain and operate the levees has ever since rested exclusively with the district (33 U.S.C.A. 701c; Exs. 328, 329, 330). The work by the Corps of Engineers on the District No. 1 levees was confined entirely to the north and south levees (Pto. 12). The Corps has never had anything to do with the western embankment, the embankment which failed.

**2. The western embankment at District No. 1.**

The western embankment at District No. 1, the embankment which failed on May 30, 1948, consisted of two railroad fills and a highway fill joined together to constitute a single structure (Pto. 18). One of these fills (the S. P. & S. fill) was built in 1907-8 as part of the original main line construction of the Spokane, Portland & Seattle Railroad (Pto. 18). A trestle was built to assist in constructing the fill (Pto. 18) and the sand from which the fill was composed was dumped over and through the trestle work (Pto. 18). When the fill was completed, the trestle stringers were removed but the piling remained (Pto. 19). This same technique was used to build the second portion of the western embankment, the so-called Union Pacific fill (Pto. 16) which was constructed, again from sand, sometime between 1910 and 1918 (Pto. 16). The two railroad fills have been in regular and con-

tinuous use ever since they were first completed. The S. P. & S. fill is on the main line of that railroad and the Great Northern (Tr. 790). Over the years the traffic across the fill has steadily increased from an average of fourteen to an average of forty-five trains per day (Pto. 20), each weighing about 1,000 tons (Pto. 20). In a single month during the 1947 high water period, 1590 trains crossed the S. P. & S. fill, weighing a total of 2,951,214 tons (Pto. 21). The Union Pacific fill has also been in continuous use since it was first built, with the volume of traffic varying from one to twenty trains per day (Pto. 17). Under this continuous stress in both wet and dry seasons the railroad fills displayed no symptoms of weakness and only normal ballasting was required to maintain them (Pto. 17, 21).

Joined to the railroad fills to constitute the third portion of the western embankment was the North Portland Road highway fill constructed in 1933 by Multnomah County (Pto. 22). At the highway level this fill was separated from the railroad fills by a depression five or six feet deep and eight to ten feet wide (Pto. 22). Below the depression the highway fill joined with the railroad fills to constitute a single structure (Pto. 18). Like the railroad fills, the highway fill had been in continuous use since it was first constructed without symptoms of weakness (Pto. 23).

The western embankment was constructed for highway and railroad rather than levee purposes. But as far as resistance to water pressure is concerned, it is the method rather than the purpose of construction

which is important and railway and highway fills are frequently incorporated in flood protection systems. Twelve miles of railway fill and more than three miles of highway fill are included in the levee system of the lower Columbia alone (Tr. 818).

There was nothing about the western embankment or its history to suggest that it would fail under flood pressure. The embankment was built of sand and sandy material (Pto. 18, 19, 22), a thoroughly acceptable levee material (Tr. 704, 821, 966, 1002, 1027) used extensively in the levee systems of the United States (Tr. 966). Sand has, indeed, special advantages for levee purposes. It has high sheer strength, high stability and sufficiently high permeability to provide drainage (Tr. 966, 1003, 1027), thus relieving internal pressure in the levee (Tr. 821, 1003, 1027). The technique by which the embankment was built, that is, by loose placement methods, has proved entirely satisfactory for levee construction (Tr. 417, 971, 1006) particularly where as here the structure has had time to consolidate (Tr. 417, 971, 1007). Conventional construction practice in 1907 when the embankment was built called for clearing of the foundation materials (Tr. 789) and the S. P. & S. contracts so provided (Exs. 336, 337). Any unusually soft material in the foundation which was not removed in the clearing process would in normal course be displaced by the fill (Tr. 788) or compacted beneath it.

The western embankment was built, like all levees, on an area subject to overflow, and, like a great many

levees, over a slough or lake bottom (Tr. 411, 966, 1003). It rested on the natural soil of the area, sandy silt (Tr. 897). Levees are regularly built over all manner of soils (Tr. 704, 966, 1003) and the soil of District No. 1 has proved satisfactory not only for foundation purposes but for use in the levees themselves (Tr. 822).

The western embankment was built to a mean sea level elevation of 47.3 feet (Ex. 306). It had a crown width of 75 feet (Ex. 306), a base width of more than 300 feet (Ex. 306), and, at the water elevation at the time of failure, a thickness of 120 feet (Ex. 306). With these dimensions the western embankment was far larger than any other embankment at District No. 1 (Exs. 308-313) and far larger than most levees (Ex. 307). The normal District No. 1 levee section calls for a crown width of 12 feet (as compared to 75 feet for the western embankment), a base width of 120 feet (as compared to 300 feet for the western embankment) and a water elevation width of 30 feet (as compared to 120 feet for the western embankment) (Exs. 308-313).

In the years between 1907 and 1948 repeated high waters tested the capacity of the western embankment to resist pressure. Prior to 1933 when the highway fill was constructed (Pto. 22), the water rested directly against the railroad fills and the pressures then experienced were not radically different from the 1948 pressure. In 1921 the water elevation was 27.4 feet m.s.l. as compared with 30.8 feet at the time of failure; in 1922, 25.6 feet; in 1923, 22.8 feet; in 1925,

24.5 feet; in 1927, 26.1 feet; in 1928, 27.6 feet; and in 1932, 23.8 feet (Pto. 25). After the highway fill was added to the embankment the high water continued: in 1933, 27.7 feet; in 1934, 19.3 feet; in 1935, 20.1 feet; in 1938, 23.7 feet; in 1942, 18.6 feet; in 1946, 23.6 feet; and in 1947, 23.1 feet (Pto. 25). The fact that the western embankment over the years had demonstrated its capacity to withstand flood pressure is, of course, an important reason why no failure was anticipated (Tr. 1035).[2]

**3. The 1948 flood fight.**

High water in the Columbia River is an annual occurrence (Pto. 3) and not infrequently the water elevation reaches flood stage (Pto. 25). The State of Oregon, its agencies and subdivisions, are therefore thoroughly familiar with flood fighting and its problems. In 1946 at the suggestion of Red Cross the Oregon Governor instructed the Oregon State Disaster Coordinator to collaborate with other Oregon officials in preparing a plan for disaster operations

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[2]Dr. Arthur Casagrande, Professor of Soil Mechanics at Harvard University, testified in this connection as follows:

> "The most reliable predictions are always made on the basis of the behavior of a structure. If we have a building that has stood in a certain locality and has behaved in a certain manner, we can rely on that experience more than we can on soil testing. And so it is with an embankment. If an embankment of the size as described has stood for that many years, and is exposed to that particular head of water, it makes no difference, in my opinion, what is in the foundation or in the embankment. The embankment and the foundation have both been tested in a manner better than I could by testing samples, and on the basis of that experience record I would judge under those conditions the embankment would be safe." (Tr. 1035).

(Pto. 58). The plan was completed and widely distributed (Pto. 58). In April 1948 Red Cross and Oregon cooperated in conducting a conference at Salem to discuss problems of disaster and disaster relief including flood problems (Pto. 58). The State Disaster Coordinator and representatives of various government agencies attended the conference (Pto. 58).

The April 1948 snow survey of the Columbia River Basin disclosed a normal snow cover and no serious flood condition was anticipated (Tr. 816, 817). By May 1st, however, the snow cover had increased materially and a flow of 650,000 c.f.s. was expected (Tr. 817). In actual fact the 1948 flow reached a peak of more than a million feet (Tr. 817) and the flood proved to be the second largest in the history of the river (Pto. 55). More than 50 cities and towns were affected to a greater or lesser degree by the high water (Pto. 73). Forty-one persons lost their lives; 70,000 people were rendered homeless; more than 400,000 acres were inundated; and the property damage has been estimated at $100,000,000.00 (Pto. 73). The flood fight involved 475 miles of levee protecting 200,000 acres of land (Pto. 73). On the lower Columbia alone, 61 drainage and diking districts were affected (Pto. 73). The flood developed suddenly. Before May 27th there was nothing to indicate that the 1948 water elevations would exceed the 27 foot levels which had been reached on numerous occasions in the past (Pto. 54).

As the high water approached District No. 1, arrangements were made to handle the flood problem. Crews were obtained from the railroads, industrial organizations in the area and the Housing Authority of Portland (Pto. 69). The Housing Authority alone had 400 men (Tr. 567) and, with Vanport college students (Tr. 568) and volunteer workers, the labor supply was virtually unlimited (Tr. 567). Bags, hay, tarpaulins, hand tools and sand were available in large quantities (Tr. 569). Passenger cars, pick-up trucks, dump trucks, graders, tractors and bulldozers were also on hand (Tr. 568). Trucks were loaded with hay and sand and placed on a standby basis with keys in the locks (Tr. 569). Elaborate systems for patrolling the levees were arranged and placed in operation. The Vanport precinct of the sheriff's office patrolled the embankments night and day (Pto. 61). HAP established a second patrol in which about fifty professional fire fighters participated (Tr. 572). The patrols were first by car (Tr. 572) and eventually on foot (Tr. 573) both at the top and the toe of each structure (Tr. 573-4) with inspectors passing the wet portions of the embankments every five minutes (Tr. 573). Along the western embankment a third patrol was established by S. P. & S. maintenance men (Tr. 838). In addition to these formal patrols, special inspection trips were frequently made by representatives of HAP, the district, the railroad companies and the Corps of Engineers. As a practical matter, the embankments at District No. 1 during the high water period were under virtually con-

tinuous inspection and there is no suggestion in the record that any development, significant or insignificant, passed unnoticed.

In Vanport, arrangements were made to give an alarm if the occasion arose (Tr. 570-1). An air raid horn (Pto. 71), the siren on the administration building (Pto. 71), and the sirens attached to the motor equipment of the sheriff's office and the fire department were available for this purpose (Tr. 571). A sound truck was stationed near the administration building ready for immediate use (Tr. 570).

During the week preceding the failure on Sunday, May 30, 1948 flood developments at Vanport were as follows.

*Monday and Tuesday, May 24th and 25th:* Highly qualified engineers, including representatives of the Corps of Engineers (Tr. 881, 879, 893-6), began routine checking of the flood fight preparations under way in the various drainage districts, including District No. 1. There the levees were inspected (Tr. 500-504) and there was a general review of preparations for the flood fight (Tr. 561).

*Wednesday, May 26th:* The Columbia River stood at 25.6 feet, with a Sunday prediction of 27.8 feet, an elevation approximately equal to the highest water of recent years (Pto. 54-5). In view of the anticipated high water, representatives of many of the property owners in District No. 1 met at the Portland Union Stockyards during the afternoon to discuss the situation (Pto. 69). A committee was

appointed with authority to approve any major expenditure which might be required (Pto. 70). There was no suggestion at the meeting that the embankments were inadequate or that Vanport was in danger or should be evacuated (Pto. 70). In downtown Portland, Red Cross representatives communicated with the mayor and the sheriff and made general preparations for the flood light (Pto. 65-6). General Walsh of the Corps of Engineers wrote to the President of District No. 1 calling his attention to the high water and the responsibility of the District "for the operation and maintenance of all the flood control works" (Ex. 331).

*Thursday, May 27th:* The Oregon Disaster Coordinator, upon notification by Red Cross that Columbia backwaters flooding the Willamette were requiring evacuation of low areas in Portland (Pto. 58), arranged for temporary shelters (Pto. 58) and alerted the agencies responsible for the Oregon disaster plan (Pto. 58). The Pacific Area Director of Disaster Service for Red Cross, with offices in San Francisco (Pto. 66), received a report of the situation and decided to go to Portland (Pto. 66). The Corps of Engineers made field assignments of all experienced personnel (Tr. 881). Corps representatives were sent to approximately thirty drainage districts in the Columbia River Basin (Tr. 881). A message center was established in the Portland office of the Corps (Tr. 884) and arrangements were made to have field reports circulated through the office (Tr. 884). Throughout the flood period Corps personnel devoted

as much as sixteen hours a day to flood work (Tr. 884).

*Friday, May 28th:* Jack R. Hayes, the Oregon Disaster Coordinator and the representative of the Oregon Governor, was in touch with the Portland situation by telephone (Pto. 59) and he decided to come to Portland to attend meetings scheduled for Saturday. The Red Cross Disaster Director arrived in Portland with members of his staff—about fifty persons in all (Pto. 66). There was a second meeting of the property owners of District No. 1 (Pto. 70). Again there was no suggestion that the embankments were inadequate or that Vanport was in danger or should be evacuated (Pto. 70). On Friday morning, Kenneth R. Dibblee, a Corps engineer with seventeen years of experience (Tr. 939), arrived in Vanport (Tr. 515) pursuant to his assignment to Districts Nos. 1 and 2 to "contact the local interests, local supervisors there, in an advisory capacity in regard to the protective measures that were being performed in their flood fight" (Tr. 940). At District No. 1 he inspected both the north and south levees (Tr. 515) and the toe and both shoulders of the western embankment (Tr. 516). Mr. Dibblee remained in the area during the day, paying particular attention to such work as was then in progress (Tr. 516-17).

*Saturday, May 29th:* After preliminary meetings with Mr. Hayes, the Oregon Disaster Coordinator (Pto. 59), Red Cross called the meeting at which

it was decided to issue the bulletin appellants criticize (Pto. 66). The meeting was held in Portland (Pto. 66) and attended by Mr. Gordon, Red Cross Director of Disaster Service for the Pacific Area, and other Red Cross executives (Pto. 67), by the Chairman of the Board of County Commissioners of Multnomah County (Pto. 67), by the Multnomah County Sheriff and one of his deputies (Pto. 67), by a representative of the Multnomah County Health Office (Pto. 67), by Tom Ward, a Housing Authority employee (Pto. 67), and by Mr. Hayes, acting for the Oregon Governor (Pto. 67). No employee of the United States was at the meeting (Pto. 67).

Under the direction of a Red Cross representative, the meeting reviewed the flood situation, concluded that there did not appear to be any "immediate danger or need for evacuation" (Tr. 914a) and then, as a precautionary measure, went on to consider the "problems we were going to encounter if it became necessary to evacuate" the 15,000 people living at Vanport (Tr. 935). Problems of housing, food, bedding and public health were considered (Tr. 914a). Since the flood crest was predicted for Tuesday (Tr. 914a) another meeting was planned for Monday (Tr. 915) at which additional information was to be provided (Tr. 915). The meeting then considered the problem of providing information to the Vanport residents (Tr. 915) and after a number of possibilities were considered and rejected (Tr. 915) it was decided that a bulletin should be distributed (Tr.

916). The contents of the bulletin were agreed upon[3] and Mr. Ward, the HAP representative, agreed to prepare and distribute it (Tr. 916). Pursuant to this understanding, Mr. Ward returned to Vanport, prepared the bulletin on the basis of notes taken at the meeting (Tr. 918), reviewed it with the Vanport project manager, and made arrangements for distribution (Tr. 919). The bulletin, as distributed to the Vanport residents late Saturday night, read as follows:

> "TO THE RESIDENTS OF VANPORT
>
> Read this carefully and keep it in case you need to refer to it.
>
> The flood situation has not changed since the prediction made last Thursday that the highest

[3]In this connection Mr. Ward testified:

"First of all, they wanted a report on the over-all situation, which from Mr. Valentine and with the concurrence of others,—the Sheriff and others—was not materially different than it had been on Thursday when they predicted that the flood would crest the following Tuesday. That situation was unchanged. We wanted to alert the people to not create a panic, to give them an idea of the plans that were being made for evacuation, to tell them where to go—and at that time the most likely places seemed the Denver Avenue fill or the railway embankment, those being the two which we understood would be the safest, and since we felt that anyone in the project would get to one or the other of those embankments without undue difficulty. We mentioned that the transportation facilities would be provided. We urged that they register if they were leaving the project for any reason in order that we would have some means of notifying relatives or friends in other parts of the country who might be concerned about them. We suggested—and this was at Dr. Weinzirl's specific recommendation—that we advise any of the handicapped or infirm to leave the project if they could conveniently do so; if not, to register at the Sheriff's office so that we would know where they were in order to give them assistance in getting out, if necessary." (Tr. 916-7.)

water would come next Tuesday, that the dikes were high enough and strong enough to withstand the crest, and that barring unforeseen developments VANPORT is safe.

However, the Housing Authority is taking every possible precaution to protect the personal safety of every Vanport resident in the event of emergency. The plan outlined is as follows:

1. In the event it becomes necessary to evacuate Vanport, the Housing Authority will give the warning at the *earliest possible moment,* upon the advice of the U. S. Army Engineers. Warning will be by siren and air horn blown continuously.

2. Sound trucks will give instructions on what to do. Those instructions briefly are as follows:

A. Don't get panicky! You have plenty of time. Take such valuables as money, papers, jewelry. Wear serviceable clothing, and pack essential personal belongings and a change of clothing in a small bag. *Do not try to take too much.* Turn off lights, stoves, close windows, lock the door.

B. If you have a car, observe traffic regulations. Carry as many people as you can.

C. If you haven't a car go toward DENVER AVENUE, or the RAILROAD EMBANKMENT, whichever is closest. Portland Traction buses will operate in the project or on Denver Avenue, depending on conditions, to take persons to places of emergency shelter. Upon arrival at shelter, the Red Cross will assume responsibility for registration and for emergency food, shelter,

and clothing. The county health department will provide emergency medical care. Cases of sickness, old age, or disability where special assistance will be necessary in case of evacuation should be reported now to the Sheriff's Office. Such cases, if they can conveniently do so, are encouraged to leave Vanport now for the next few days.

Also, persons who *for any reason* are leaving Vanport to be away for several days are urged to register at the Sheriff's Office before leaving. This will help to answer inquiries from anxious friends and relatives who do not know where you are.

REMEMBER:
DIKES ARE SAFE AT PRESENT
YOU WILL BE WARNED IF NECESSARY
YOU WILL HAVE TIME TO LEAVE
DON'T GET EXCITED!"

During Saturday events at District No. 1 took their regular course. Engineers from the district, the Housing Authority and the Corps toured the levees (Tr. 519-520) and reviewed flood conditions generally (Tr. 520). Two assistants were assigned to Mr. Dibblee at Vanport and they so arranged their working schedule that some Corps representative was always in the area (Tr. 521).

*Sunday, May 30th:* During the morning the Portland office of the Union Pacific received a report of seepage through the western embankment (Tr. 864). The roadmaster and the terminal trainmaster went immediately to District No. 1 to inspect the fill (Tr.

864). They made, on foot, a detailed inspection both along the toe and along the top of the fill (Tr. 868-9). About 200 feet north of the area of eventual failure they found a small boil or boils (Tr. 868) and talked with a Vanport fireman, who was patrolling the fill (Tr. 870). The fireman returned to Vanport to report (Tr. 870) and the Union Pacific representatives continued their inspection. There were no boils, cracks or other unusual developments in the area of eventual failure (Tr. 871) and there was nothing to suggest any weakness in the embankment (Tr. 872).

On Sunday morning an S. P. & S. section foreman discovered that at a point north of the area of eventual failure and adjacent to the boils (Tr. 484) one of the S. P. & S. tracks had settled slightly (Tr. 485). The foreman reported to the S. P. & S. trainmaster (Tr. 483) who told him to raise the track (Tr. 483). A slow order, the customary railroad procedure for track irregularities (Tr. 840), was put into effect (Tr. 483). About 10:30 A.M., the foreman watched a train cross the low spot "to see whether the fill was safe, whether it was solid enough to let trains over okey" (Tr. 488). "The train didn't seem to put the track down any more than it was" (Tr. 488). During the morning, the foreman saw a crack fifteen or twenty feet long, a quarter of an inch wide and a few inches deep (Tr. 477) located on the inside shoulder of the Union Pacific fill and parallel with the track. The foreman left the fill at 3:50 P.M. Sunday afternoon (Tr. 489), about a half hour before the failure. He testified he had seen nothing to indicate the embankment might fail (Tr. 489).

The boil report reached Carl Thomas, Chief Engineer for the S. P. & S. Mr. Thomas, who knew all about the western embankment (Tr. 786, 789) and who was thoroughly experienced with railroad fills in flood periods (Tr. 785), made a careful inspection of the western embankment beginning about one o'clock Sunday afternoon (Tr. 791). He inspected the boils (Tr. 797) and was satisfied they were responding to treatment (Tr. 791-2, 797). He also inspected the crack discovered by the section foreman (Tr. 792-3, 799). There was nothing significant, in his opinion, about the crack (Tr. 793). He testified he had seen similar cracks in railroad fills "quite frequently; every time we have high water along the Columbia River" (Tr. 793).[4] Mr. Thomas left the western embankment shortly before 4:00 P.M. (Tr. 794) and hence within a few minutes of the failure. He testified he had seen nothing to suggest that the fill might fail or that traffic over the fill should be stopped or that the railroad passengers crossing the fill were in any way unsafe (Tr. 795). Other S. P. & S. representatives who were on the western embankment Sunday afternoon testified to the same effect. The witnesses include another section foreman who, with a crew of men, worked on the embankment during the afternoon (Tr. 860); the S. P. & S. assistant master carpenter, who made care-

[4]Mr. Thomas explained the crack as follows:

"Well, we attribute these cracks to what we call a kind of outside slip. There is no question but what moisture has a little bit to do with it. But the outside of a fill, the very outside, is not compacted like the fill is itself, and when there is any moisture, as there is from a high water, there is a tendency for the outside to slip. But it very seldom, if ever, carries back into the fill itself." (Tr. 794).

ful inspections of the fill, including observations of its reaction to the weight of the trains which were crossing it (Tr. 853-5); and an S. P. & S. telegrapher, who only a few minutes before the failure occurred climbed the Vanport side of the western embankment at the exact location of eventual failure (Tr. 460). No one saw anything to suggest trouble (Tr. 860, 853-5, 460).[5]

In addition to the Sunday inspections by personnel of the railroad companies, the western embankment was inspected that day by the president of District No. 1 and its former engineer (Tr. 555-6), by engineers of the Housing Authority (Tr. 557), once more by the one-time district engineer (Tr. 558) and by a representative of the Corps of Engineers (Tr. 509). Each testified that he saw nothing to suggest that the embankment might fail or that Vanport was in any danger (Tr. 558, 509, 510).

*The failure:* The western embankment failed between 4:00 and 4:30 P.M. on Sunday afternoon (Pto. 71). The failure was so sudden and unexpected that two railroad employees standing on the embankment were carried into the water (Tr. 854-5). The flood waters, after first filling the sloughs and drainage system of the Vanport area (Pto. 71), advanced eastward across the district approximately at the rate a

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[5]On Sunday and for sometime prior thereto the Union Pacific and the S. P. & S. were under technical "seizure" by the United States in connection with a labor controversy and Army representatives had been assigned to the Portland office of the companies (Pto. 75-79). The Army representatives did not participate, however, either in the flood fight or in the management of the railroads (Pto. 77).

man walks (Pto. 71-2). It took from 45 to 75 minutes for the district to fill (Pto. 72).

Representatives of the sheriff's office, of HAP and of the Vanport fire department saw the failure (Pto. 71) and reported immediately to their respective organizations (Pto. 71). The sheriff's deputies manned their equipment and, together with three engines from the Vanport fire department, circulated through Vanport operating their sirens and giving the alarm (Pto. 71). The sound truck which had been stationed near the administration building joined in this work; and the siren on the administration building and the air raid horn were placed in operation (Pto. 71). In response to the alarm the Vanport residents made their way across the project and on to Denver Avenue. During the night and thereafter Red Cross provided housing and food to the evacuees (Pto. 67). The Red Cross flood relief payments in Multnomah County totaled $2,012,469.07, a part of which went to the residents of Vanport (Pto. 67).

The cause of the failure of the western embankment is unknown (Tr. 334, 437, 799, 975, 1009, 1031). The possible explanations include "a soft bottom" (Tr. 550), voids or piping (Tr. 696), foundation difficulties (Tr. 437), variations in the permeability of different portions of the structure (Tr. 975), a small fault (Tr. 1032) and liquefaction (Tr. 1032), but these are only unverified speculations and recognized as such. Never before has an embankment

of similar size and composition failed under comparable water pressure (Tr. 973, 1030, 1045-46).

This account of the Vanport failure, presented here in summary fashion, was presented to the lower Court at length and in detail. Nearly seventy witnesses testified. Some of these witnesses were called by appellants; some by appellee. They agreed, however, in saying that there was no reason to expect that the western embankment would fail; that there was no reason to believe Vanport was in any danger; that there was no reason to suggest an evacuation. In the light of this testimony the Court below concluded, and the Government believes necessarily concluded, that there was no negligence and hence that appellants have no claim.[6]

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[6]Much of the material included in appellants' statement of the case is erroneous. Vanport was built not by FPHA (p. 5) but by Kaiser (Pto. 30). Appellants were not tenants of the United States (p. 6); they were tenants of the Housing Authority (Exs. 393, 396, 397). Appellants received no assurance "that the dikes would hold" (p. 6); the bulletin said only that "*barring unforeseen developments* Vanport is safe" (Ex. 364). The Corps of Engineers was not "without any knowledge whatsoever" (p. 7) or "utterly and completely ignorant and uninformed" (p. 27) or "without knowledge of" (p. 32) or completely lacking in "knowledge of the composition and stability of" the western embankment (p. 34); the Corps representatives knew the size of the embankment (Tr. 820, 880, 881, 894, 940), that it was composed of sandy material (Tr. 821, 885, 896, 940), that it had been built for railroad purposes (Tr. 823, 885, 896-7, 941), that railroad fills are frequently built by dumping materials through a trestle (Tr. 885, 897, 941) and that it had withstood prior periods of high water (Tr. 823, 885, 896, 940). The Corps also knew about foundation conditions since the Corps had used the soil of the district to reconstruct the north and south levees (Tr. 882, 885, 897). Appellants say muddy water was running along the side of the western embankment (p. 7); but the witness who so testified did not claim to have investigated the source of the water (Ex. 199, pp. 52-3) and muddy water in this drainage ditch was an ordinary occur-

## SUMMARY OF THE ARGUMENT.

The judgment below should be affirmed:

*First.* Because the finding that there was no negligence or wrongful conduct by those who participated in the flood fight is fully supported by the record. There is no evidence that anyone knew or could have known that Vanport was in danger. There is no testimony criticizing what was done in the flood fight or suggesting that anything of significance was left undone. The persons who participated in the flood fight were expert, fully informed, diligent and careful.

*Second.* Because there were no "false assurances of safety". Appellants were warned that an evacuation of Vanport might become necessary and the statements appellants criticize were in fact accurate

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rence (Tr. 601). There was no crack in the top of the fill three days before the break (p. 8); a careful inspection on Sunday morning of the area of eventual failure disclosed no cracks, boils or anything unusual (Tr. 870, 871, 877). The crack which appeared during the course of the day was not four or five inches wide (p. 8); it was about a quarter of an inch wide (Tr. 477, 792, 799). The boils in the western embankment were not at the area of failure (p. 8); they were 200 feet to the north (Tr. 868, 797, 859). The boils were not unattended (p. 8); they received the traditional ring levee treatment to which they responded in satisfactory fashion (Tr. 791-2, 797, 859). The Vanport side of the embankment was not so covered with brush as to make inspection impossible (p. 8); the western embankment was repeatedly inspected (Tr. 868, 869, 791, 555-7). The opinions expressed to the cause of the failure (p. 8) were in fact only speculation and the witnesses so recognized (Tr. 334, 437, 799, 975, 1009). To date the failure is unexplained (109 F. Supp. 226). The report by Mr. Dibblee does not suggest "errors and mistakes of the United States Army Engineers" (p. 10); it only makes recommendations for future flood fights in the light of the Vanport experience (Ex. 12). The District No. 1 levees were not "all leaking badly" (p. 26); they were displaying only normal seepage (Tr. 522) which readily responded to treatment (Tr. 902-3, 944-9).

The case which appellants have briefed is not this case.

and careful. Those statements, moreover, were not made by employees of the United States and there is no proof appellants relied upon them.

*Third.* Because negligent representations are not actionable in Oregon or under the Tort Act.

*Fourth.* Because the United States neither had nor assumed any duty to appellants.

*Fifth.* Because flood fighting is discretionary activity upon which no claim can be founded under the Tort Act.

*Sixth.* Because alleged negligence of public officials in a period of public peril is not actionable.

*Seventh.* Because Congress has expressly provided (33 U.S.C.A. 702c) that the United States shall not be liable for flood damage.

*Eighth.* Because appellants assumed the risk of flood loss.

The Vanport flood, like any other public catastrophe, brought in its wake a host of rumors. These cases were filed in reliance on those rumors. The trial developed the facts, destroyed the rumors and demonstrated that the claims are without merit.

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## ARGUMENT.

### A. THERE WAS NO NEGLIGENCE.

Liability under the Tort Act depends upon proof of negligence or wrongful conduct (28 U.S.C.A. 1346 (2)(b); *Dalehite v. United States,* 346 U.S. 15, 55

(1953)). The Court below, fully aware of the importance of the negligence question, made a painstaking examination of the record and entered extensive findings rejecting all charges of negligence or wrongdoing in connection with the flood fight. The District Judge found:

> "6. At approximately four thirty on Sunday afternoon, May 30, 1948, and when the flood water in the Columbia River stood at an elevation of 30.8 feet, m.s.l., the western embankment at Peninsula Drainage District No. 1 suddenly failed. The failure resulted from a break in the embankment rather than overtopping. The failure was so rapid and unexpected that railroad employees who were inspecting the embankment were precipitated into the water. Within an hour the whole Vanport area was flooded. The houses in Vanport were damaged beyond repair and personal property belonging to the Vanport residents, including property of the plaintiffs, was destroyed by water damage as a direct result of the break. Fourteen lives are reputed to have been lost but about 16,000 people were evacuated safely.
>
> 7. The western embankment was constructed, owned and operated by the railroad companies and not by the United States. At the point where the embankment failed it had an elevation of 47.3 feet, a crown width of 75 feet and a thickness of 120 feet at the water level. It was much larger in section than the other embankments surrounding Vanport and at the time of failure the water was more than 15 feet from the top of the structure. Although the embankment has

been examined in detail, together with the character of the ground where it was built and the materials and methods used in its construction, the cause of the failure has not been shown and appears to be unknown.

Prior to 1948 the western embankment had withstood the floods of 1933 of 27.7 feet, of 1928 of 27.6 feet, of 1921 of 27.4 feet and other floods of less height. The alleged fact that there were decayed timbers in the fill and that ordinary sand was used in its construction has not been proved to have had any effect. No one thought there was a possibility that the western embankment would fail since it was higher, broader, less subjected to pressure of water and was thought to be better consolidated because of the pressure of tremendous weight which it continuously bore. The United States did not own, construct, maintain or operate the western embankment which failed under pressure of the Columbia River Flood waters on May 30, 1948. This embankment had been constructed, maintained and operated by the Railroad Companies for many years and was used for carrying trains of enormous weight up to the very moment of disaster and was not constructed primarily for the purpose of flood control. It was also protected by a highway fill of less height which ran between it and the river under ordinary water conditions. No cause for the failure of the western embankment has been proved. No act or omission of the United States, the Corps of Engineers, the Housing Authority of Portland, the railroads and the agencies, officers or employees of any of them in connection with the flooding of plain-

tiff's property was without due and ordinary care. No act or omission of any such person or entity above named was the cause of the flooding of the property of the plaintiff.

The Corps of Engineers, the engineers of the railroad companies who had charge of the original construction and present management of the fill, the Housing Authority of Portland and its executive and administrative employees, together with the representatives of the State, community and national relief organizations, as well as individual residents of Vanport who testified at the trial, all saw no reason to apprehend danger and all believed that the western embankment would stand. No care or precaution could have given notice that any break would occur. There has been no proof of negligence in connection with the construction, maintenance or operation of the western embankment.

8. The Corps of Engineers is an agency or instrumentality of the United States in its sovereign capacity. For many years the Corps has helped to protect the nation from floods. Many levees and embankments have been constructed by the Corps or under its supervision. During the 1948 Columbia River flood, as on innumerable other occasions, the Corps, owing to the high competence of its officers and engineers, helped in the effort to control the flood waters not only in the Vanport area but up and down the Columbia River for a distance of five hundred miles. In that connection the Corps gave general publicity to the approaching high water and maintained a careful and consistent inspection of the areas and dikes involved, including those

at Vanport. Within the limits of available personnel, the Corps also gave technical advice and assistance to those participating in the flood fight. However, the Corps did not take charge of the flood fight at Vanport; nor did the Corps attempt to guarantee the safety of the dikes at Vanport or elsewhere. All the acts done and advice given by the Corps and its representatives and employees in this situation of widespread peril to the public were honest and competent. No negligence on the part of the Corps of Engineers, its employees or representatives, has been proved. The Corps of Engineers and its representatives neither had nor assumed any obligation to be responsible for the safety of the Vanport residents or their property and no duty was imposed upon the United States by the activities of the Corps.

9. On May 30, 1948, the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company were under technical 'seizure' by the United States in connection with a labor dispute resulting in an alleged national emergency. The 'seizure' of the properties of these railroads was a fiction of the flimsiest kind. That 'seizure' did not in fact affect in any way the ownership or control of the railroads or their properties, including the ownership or control of the western embankment at Vanport. No duty on the part of the United States to maintain the western embankment for flood protection purposes, or at all, arose out of this so-called 'seizure'. Moreover, no act or omission of any employee of the railroads has been proved which constituted negligence. The

officers and employees of the railroads, whether under federal control or not, acted in the light of all available knowledge as to the construction of the fill, the materials used and the nature of the underlying ground. As operators of railroads they acted with respect to the safety of their passengers and freight under a duty almost absolute. Yet trains passed over this fill at the regularly established intervals all during the flood period and up until half an hour before the break occurred. The United States did not build, maintain or operate the western embankment and had no responsibility therefor. Inspections of the embankment were made with meticulous care. Precautions were taken. All the indicia of disaster now pointed up by the event were appraised at the time by the railroads' representatives in the light of their duty to their own passengers and freight and of their knowledge of the nature of the fill. The event proved them wrong but not negligent.

* * * * *

11. No negligence on the part of the Housing Authority or its agents or employees has been proved. They carefully inspected the embankments surrounding Vanport and took care of weaknesses which developed or assisted others therein. They established patrols of the embankments and kept watch of the height of the water on all sides. Efficient arrangements were made, moreover, for the evacuation of all persons in the case of necessity. The proof of the care used in this regard is that Vanport was evacuated unexpectedly in a period of about an hour of some 16,000 people with small loss of life."

The Vanport situation received, of course, continuous attention from those who were participating in the flood fight: from Red Cross, which was receiving reports from a surveyor and about fifty amateur radio operators operating mobile units in the flood area (Pto. 68); from the officials of District No. 1 who inspected the levees on Sunday morning (Tr. 555-7); from the Vanport precinct of the sheriff's office which was conducting an independent patrol of the levees and embankments (Pto. 61); from the Multnomah County Commissioners, who received information from the sheriff (Pto. 63); from the representative of the Oregon Governor who received information from the sheriff (Pto. 63) and from Red Cross (Pto. 67); from property owners in District No. 1 who held meetings to review the situation (Pto. 69-70) and participated in the inspection trips around the levees (Tr. 519); from the engineers and roadmasters of the railroads who made meticulous examinations of the western embankment (Tr. 864-872, 785-799, 852-857); from the executives and engineers of HAP who arranged for a patrol of the levees (Tr. 572-575) and who participated in the inspection trips (Tr. 519-521); from representatives of the Corps of Engineers assigned to Districts Nos. 1 and 2 (Tr. 519-521, 499-508); and, of course, from the Vanport residents themselves, who visited the levees in great numbers (Tr. 794). Not one single person saw any reason to believe that Vanport was in danger. The failure came as a complete surprise. It was so sudden that men standing on the embankment in apparent

safety were carried into the water (Tr. 854-5). It was so unexpected that two passenger trains were about to proceed across the embankment when it failed (Tr. 845).

The persons who shared the view that Vanport was in no apparent danger were expert, careful and, contrary to appellants' extravagant assertions, fully informed. They include: 1. Appellants' witness, *John Suttle,* one-time district engineer (Tr. 550) and the man who built the north and south district levees (Tr. 552). Mr. Suttle had personal knowledge of the original construction of the western embankment and he supervised completion of the construction of that embankment in 1917 (Tr. 551). He made regular inspection trips around the levees during the high water period (Tr. 553) and twice inspected the western embankment on Sunday (Tr. 555-7). He testified that he did not think Vanport was in danger (Tr. 558). 2. *Carl Thomas,* Chief Engineer for the S. P. & S. (Tr. 784), a graduate, licensed engineer (Tr. 784) who for thirty years had been personally familiar with the western embankment (Tr. 789) and with company records showing how it was constructed (Tr. 786). Mr. Thomas spent Sunday afternoon on the embankment for the express purpose of inspecting it (Tr. 790-794). He testified that he believed passengers riding across the fill that afternoon were entirely safe (Tr. 795). 3. *N. S. Westergaard,* S. P. & S. Road Master (Tr. 836) who, like Mr. Thomas, was thoroughly experienced with railroad fills in flood periods (Tr. 836, 837) and familiar with the western

embankment construction records (Tr. 836). Mr. Westergaard received detailed reports of the condition of the embankment (Tr. 838-844) and permitted traffic to flow without interruption over the fill (Tr. 844). He too believed that the Sunday passengers were safe (Tr. 844-5). 4. *Harold Martinsen,* Assistant Master Carpenter for the S. P. & S. (Tr. 852), who during the hour preceding failure carefully inspected the western embankment (Tr. 855) checking its reaction to traffic (Tr. 855) and who, anticipating no failure, was standing at the location of the break when it occurred (Tr. 854-5). 5. *George E. Cunningham* and *Paul Williams,* S. P. & S. section foremen, who did maintenance work on the fill on May 30 and preceding days and who saw no reason to anticipate failure (Tr. 478-489, 859-862). 6. *Carl Saling* and *R. L. Rickard,* Road Master and Trainmaster for the Union Pacific, who on Sunday morning made an elaborate inspection of the toe and crown of the entire western embankment, including the area of eventual failure, without seeing anything to indicate weakness (Tr. 868-872; 875-877). 7. *Roy Taylor,* Assistant Director of Management for HAP, and *C. S. McGill,* Maintenance Engineer for HAP, who participated in the daily inspection trips (Tr. 561-65; 592-9) including a Sunday inspection of the western embankment (Tr. 598-599). They heard no suggestion and saw no reason to believe that the western embankment might fail or that Vanport should be evacuated (Tr. 582-583; 600). 8. *Harry K. Doyle* of the Corps of Engineers, one of the most experienced flood control engineers in

America (Tr. 893-6). During the week prior to failure, Mr. Doyle visited Vanport each day, inspecting each location at which any significant development had occurred (Tr. 499-508). He neither saw nor heard anything to indicate that the western embankment might fail (Tr. 903); he saw no reason to suggest evacuation of Vanport (Tr. 903) and no one made that suggestion to him (Tr. 903). 9. *Kenneth R. Dibblee* of the Corps, another experienced engineer (Tr. 939), who, beginning Friday, spent a large portion of each day inspecting the District No. 1 embankments (Tr. 514-522). Nothing Mr. Dibblee saw or heard suggested to him that the western embankment might fail (Tr. 945) or that Vanport should be evacuated (Tr. 945).

This on any standard is an impressive list of witnesses. It includes virtually everyone who was informed about the flood situation at District No. 1. It includes witnesses for both appellants and appellee. It includes the best talent of the railroad companies, the district and the Corps of Engineers. And there is no disagreement. No one could see any reason to believe that Vanport was in danger.

Appellants, as a matter of fact, do not seriously contest this fundamental proposition of no apparent danger. They argue, rather, that they received "false assurances of safety" and go on to suggest that in the absence of such assurances they would have left Vanport. Nothing in the record supports either the argument or the suggestion. To begin with, there were no

assurances of safety, no promises that "the dikes would hold" (Br. p. 6). On the contrary, the statements to which appellants refer go no further than to say that there is no apparent danger but each carries a warning that the situation might change. The Friday Journal (Ex. 421) said "There is nothing at present to indicate that the dikes will not hold, but every precaution is being taken". The Saturday Journal (Ex. 422) quotes the Vanport project manager as saying, "We are taking every precaution but we do not expect any danger" and adding "Ample warning will be given if real danger develops". The Sunday Journal (Ex. 423) carried a story entitled "No Vanport Danger" and then in bold type "BUT PREPARATIONS MADE—'IN CASE' ". The Saturday Oregonian (Ex. 430) contains a statement "Neither is Vanport City in any foreseeable danger" and adds "Preparations are being made to care for Vanport's 25,000 inhabitants if the situation should change". On Sunday the Oregonian (Ex. 431) quoted the Vanport manager "We feel there is no cause for worry, but we are not overlooking what might occur" and again, "We don't want to alarm Vanport residents but the people should be aware of the situation and be ready to move if it has to be done. Every precaution should be taken to prepare for emergency evacuation of invalids and children." Thus the newspapers. Clearly there is here no guarantee of safety. There is only a statement—and a true one—of no present indication of danger, coupled in every instance with a plain warning that the situation might change.

The bulletin distributed to the Vanport residents on Saturday night says the same thing: that there is no apparent danger but that an evacuation may be necessary. Of this bulletin, the District Court said:

> "There is here no contract nor guarantee that the river will not flood Vanport. The express language assures safety only at the moment of issue. It does not assure any one that there will be no flood on Tuesday nor on Sunday. * * * The bulletin very positively told each of these plaintiffs that, if a flood came, they would be warned in time to get out themselves, but that they could save no property at all, unless one happened to be on the spot at the time and then he could save only his most valuable possessions and a change of clothing. 'Don't attempt to take too much', in the circular, rings the death knell of these claims." (109 F. Supp. 226).

The bulletin in substance was not an assurance of safety; it was a plan for evacuation. And appellants were well aware of that fact. The plaintiffs below uniformly testified that they understood from the bulletin that an evacuation might become necessary (Tr. 31, 42-3, 52, 74, 86, 109, 120, 130, 140, 150, 158, 172, 177-8, 182, 192, 202, 217, 228, 237, 247, 255, 264, 274, 284, 292-3, 303-4, 340, 351, 355, 536). The false assurances of safety of which appellants complain simply do not exist.

Nor were these so-called assurances of safety assurances from the United States or its employees. Thirty-eight of the Vanport plaintiffs testified at the trial (Tr. 28-378). Each was carefully examined as

to the source of his flood information. As might be expected, that information was obtained from family and friends, from the bulletin and from the newspapers and radio (Tr. 30, 42, 44, 49, 77, 84, 111, 119, 128-9, 138-9, 149-50, 157-8, 171, 176, 183-4, 191, 200, 216, 226-7, 236, 249, 259, 264, 277, 285, 291-2, 303, 311, 339, 348, 355, 536). No one of the plaintiffs claimed to have communicated with or received advice from any representative of the Corps of Engineers during the flood period (Tr. 28-378).

The bulletin was not the work of the United States or its employees. No representative of the Corps, no employee of the United States, attended the Red Cross meeting (Pto. 67) or had anything to do with the bulletin (Tr. 827, 904, 946). Red Cross, Mr. Hayes, representing the Oregon Governor, the County Sheriff and the Chairman of the Board of County Commissioners met and decided to issue the bulletin in terms then agreed upon (Pto. 67). HAP participated but its participation was purely mechanical and confined to the physical preparation and distribution of the document. Naturally enough the HAP representatives were willing to do what the Oregon officials thought best, but those officials, not HAP, are responsible for the bulletin and its contents. To the extent, therefore, that appellants base their claims upon the bulletin, the claims should be addressed to Red Cross or to Oregon, not to the United States. Nor, needless to say, can the United States be held responsible for newspaper accounts. The suggestion that the United States should pay millions of dollars of damages be-

cause of obscure and casual references in the Portland newspapers to the Corps and to HAP is too frivolous to warrant discussion.

The record discloses another objection to appellants' assurance-of-safety argument. It is suggested that absent the bulletin and the newspaper comment, the Vanport plaintiffs or some of them would have left the project (Br. p. 41). The record contains no support for this suggestion. No one of the plaintiffs so testified. Not one of them claimed that at any time he made plans to leave or to remove his property (see, for example, Tr. 81, 125, 133, 287) or suggested that his actual conduct was in any way affected by what the bulletin or the newspapers had to say (Tr. 28-378). Appellants' argument that the cause of their damage was not the flood but alleged assurances of safety is entirely unproved and more than a little disingenuous.

Since there were no assurances of safety, false or otherwise, since such statements as were made were not the work of the United States or its employees and since those statements did not, on the record, actually affect the conduct of anyone, it makes little difference how much or how little the Corps representatives knew about the western embankment. The fact is, however, that appellants' extravagant charges that the Corps was "without any knowledge whatever" (p. 7) and "completely ignorant and uninformed" (p. 27) are wholly untrue. The conclusion that Vanport was not in any apparent danger was not the conclusion of the Corps representatives alone. It was the conclusion of everyone. It was, for example, the con-

clusion of appellants' witness, John Suttle, who for many years had been engineer for Districts Nos. 1 and 2 (Tr. 550). Mr. Suttle built the north and south levees of the district (Tr. 552) and he knew as much about the western embankment as any man could. He was in the area when work on the embankment began (Tr. 551); he had charge of completing the embankment in 1917 (Tr. 551); and since he joined in the regular inspection trips (Tr. 553-7) he knew of all developments. What more was there to know? Mr. Thomas and Mr. Westergaard of the S. P. & S. also had complete information. Each had years of personal familiarity with the western embankment (Tr. 789, 836) and each knew from company records how and from what materials it had been constructed (Tr. 787, 837). Mr. Westergaard received detailed reports of developments during the flood period (Tr. 838-844); Mr. Thomas spent Sunday afternoon on the embankment itself (Tr. 790-4). Both men were fully confident of the strength of the structure and both, obviously, were fully informed. The Corps of Engineers representatives, General Walsh, Mr. Ragsdale, Mr. Doyle and Mr. Dibblee, all with wide engineering and flood fighting experience, also knew everything of significance about the western embankment. They knew its size (Tr. 820, 880, 881, 884, 940), that, as anyone could see, it was composed of sandy material (Tr. 821, 885, 896, 940), that it had been built for railroad rather than levee purposes (Tr. 823, 885, 896-7, 941), that railroad fills are frequently built by dumping material through a trestle (Tr. 885, 897, 941), and

that it had withstood prior periods of high water (Tr. 823, 885, 896, 940). The Corps knew, of course, about foundation conditions at District No. 1 since it had used the natural soil of the area to reconstruct the north and south levees (Tr. 822, 885, 897). Complaints that these witnesses lacked information are frivolous and the Court below was quite right in rejecting them. "All acts done and advice given in this situation of widespread peril to the public were honest and competent" (109 F. Supp. 223).

It is significant, moreover, that although appellants argue that during the flood period important data about the western embankment was missing, they do not suggest what that data might be nor have they provided it for the record. The western embankment still stands, ready for investigation. Foundation conditions at District No. 1 can be explored by anyone with a mind to do so. Yet appellants have learned nothing new—nothing the railroads, the district, the Corps and HAP did not know in May, 1948. Appellants' failure to bring to court the information which they say should have been available during the flood fight is the best possible proof that no such information exists.

Finally, it should be noted that this record demonstrates affirmatively that there is nothing whatever about the western embankment or its history which would or could have given warning of failure. The pre-trial order contains complete and detailed information as to the method of construction, the history and condition of the western embankment (Pto. 15-

24). Five of the most highly qualified flood control engineers in America, asked to assume the facts stated in the pre-trial order and having in mind the developments of the flood period, all agreed that there was nothing to suggest Vanport was in danger. The witnesses so testifying were: 1. *Thomas M. Middlebrooks,* Chief of the Soils Branch of the Corps of Engineers (Tr. 961). Mr. Middlebrooks has been responsible for the design of between 75 and 100 earth dams (Tr. 962) and, since 1927, for all levees constructed by the Corps (Tr. 963). In that connection he has approved or reviewed the design for between 1500 and 2000 miles of levee (Tr. 964). Mr. Middlebrooks testified that he knew of no other instance in which a structure of the size and composition of the western embankment had failed under comparable water pressure (Tr. 973); that he would not have expected the western embankment to fail (Tr. 974); that he would not have recommended evacuation (Tr. 974); and that, assuming a failure were to occur, he would have expected it to be gradual and to continue over a minimum period of a number of hours (Tr. 974). 2. *Robert R. Philippe,* Chief of the Soils and Cryology Branch, Military Operations, of the Office of the Chief of Engineers (Tr. 998). Mr. Philippe until recently was Chief of the Ohio River Division Laboratories at Cincinnati (Tr. 998). He has done extensive consulting work (Tr. 1000); he has had experience with 70 or 75 earth dams (Tr. 1000) in the design stage and with about 50 such dams in the construction stage (Tr. 1000); and he has designed or supervised the design of about forty flood protection projects along the Ohio

River (Tr. 1001). Mr. Philippe testified that he had never known of a comparable failure (Tr. 1007); that he would not have expected failure (Tr. 1007); that he would not have recommended evacuation (Tr. 1008-1009); and that, assuming the western embankment were to fail, he would have expected that the failure would have been gradual "over a period of hours or probably longer" (Tr. 1008). 3. *Dr. Arthur Casagrande,* Professor of Soil Mechanics and Foundation Engineering at Harvard University (Tr. 1022) and one of the principal contributors to the development of modern soil mechanics (Tr. 1023). Dr. Casagrande has done consulting work for Columbia, Argentina, Canada and the Panama Canal (Tr. 1024); he has had experience with the construction of about 20 earth dams (Tr. 1024); he has done research in connection with the design and construction of levees (Tr. 1025), including employment by the Mississippi River Commission to make a special study to improve levee design (Tr. 1025). Dr. Casagrande testified that he had never known of an instance in which an embankment of the size of the western embankment had failed under comparable water pressure (Tr. 1030); that he would not have expected failure (Tr. 1031); that he would not have recommended evacuation (Tr. 1031); and that if failure were to occur he would have expected it to occur gradually, "a matter of several hours at least" (Tr. 1030). 4. *Willard J. Turnbull,* Chief of the Soils Engineering Division of the Waterways Experiment Station at Vicksburg (Tr. 1042). Mr. Turnbull said he has never known of an embank-

ment such as the western embankment to fail under comparable water pressure (Tr. 1045-1046); that he would not have expected failure (Tr. 1044) or recommended evacuation (Tr. 1045); and that he would have expected the failure, if any, to have taken place over a period of "several hours and possibly days" (Tr. 1044). 5. *Julian Hinds,* General Manager and Chief Engineer of the Metropolitan District of Southern California, an organization which provides water to 35 cities (Tr. 403) and which owns a series of canals and aqueducts 500 miles in length (Tr. 404) for which Mr. Hinds is generally responsible (Tr. 404). Mr. Hinds has practiced engineering for more than 40 years (Tr. 404-6); he has worked in connection with approximately 50 dams (Tr. 406); and he has designed and supervised the construction of thousands of miles of canals and embankments, including training walls and levees (Tr. 406). Mr. Hinds testified that he would not have expected the western embankment to fail (Tr. 422); that he would not have recommended the evacuation of persons living behind it (Tr. 423); and that, if a failure were to occur, he would anticipate that it would take place "over several hours at least" (Tr. 421).

This testimony is from the best men in the business. It is uncontradicted. It is proof positive that no amount of information, no amount of engineering talent could have provided a warning of the Vanport flood. The people conducting the flood fight were as diligent, as careful and as wise as human capacity permits. They were not negligent.

### B. NEGLIGENT MISREPRESENTATIONS ARE NOT ACTIONABLE UNDER THE TORT ACT OR IN OREGON.

By insisting that their case depends on false assurances of safety, on talk rather than conduct, appellants raise insuperable law obstacles to their claim. Liability under the Tort Act (28 U.S.C.A. 1346(b)) depends upon proof of loss "caused by the negligent or wrongful act or omission of any employee of the Government". The reference, it will be noted, is to an "act or omission", not to a statement or representation. Indeed, the statute goes on expressly to provide (28 U.S.C.A. 2680(h)) against District Court jurisdiction over:

> "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights".

Plaintiffs pitch their case squarely on "false assurances of safety" (Br. p. 16). Surely any such false assurance of safety is a misrepresentation. Under the plain language of 28 U.S.C.A. 2680(h), a claim thus founded cannot be heard. In *Jones v. United States,* ..... F. 2d ....., decided October 28, 1953, the Court of Appeals for the Second Circuit so held. A complaint charging in two counts deceit and negligent misrepresentation was dismissed by the trial court as outside the jurisdiction conferred by the Tort Act. On appeal, the order was affirmed by an opinion reading in full as follows:

"FRANK, Circuit Judge:

Plaintiffs' second cause of action asserts wilful misrepresentation. This claim is clearly barred by Sec. 2680 (h) of the Act. See United States v. Silverton, 200 F. (2d) 824 at 826 (C. A. 1). We think the first cause of action, for negligence, is also barred. Section 2680 (h) prohibits suits against the government on claims arising out of 'assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.' Since 'deceit' means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation, since otherwise the word 'misrepresentation' would be duplicative. The construction is strengthened by the inclusion of libel which may be either negligent or intentional.

"The defendant has raised a number of other arguments in its briefs which we need not consider.

"AFFIRMED."

The Missouri District Court in a suit arising out of the Kansas City flood has reached the same conclusion. See *Mid-Central Fish Co. v. United States,* 112 F. Supp. 792 (1953). Appellants have rested their case on a claim that cannot be heard.

Even if a negligent representation were actionable under the Tort Act appellants would not be materially aided. Oregon law controls (28 U.S.C.A. 1346(b)) and the Oregon courts apparently refuse to recognize a claim based upon a representation which is merely

negligent. *Medford National Bank v. Blanchard,* 299 Pac. 301 (Ore. 1931); *Sharkey v. Burlingame Co.,* 282 Pac. 546 (Ore. 1929). Compare *Coughlin v. State Bank of Portland,* 243 Pac. 78 (Ore. 1926). In any event, the Oregon decisions have settled the rule that statements of opinion or representations as to matters of judgment are not actionable. *Hansen v. Holmberg,* 156 P. 2d 571 (Ore. 1945); *Horner v. Wagy,* 146 P. 2d 92 (Ore. 1944); *Ward v. Jenson,* 170 Pac. 538 (Ore. 1918). It can hardly be denied that a representation as to the condition of an embankment or as to the possibility of a flood is an expression of judgment or opinion. In Oregon, such a representation by a private person, even though negligent, would not be actionable. There is, therefore, no liability upon the United States.

Even this is not an end to the difficulties appellants make for themselves by basing their case on talk rather than conduct. Liability for negligent advice, even in those jurisdictions where it is recognized, is carefully confined to those plaintiffs to whom the defendant, as a part of a commercial arrangement, owes a duty to make representations or give advice. *Ultramares Corporation v. Touche,* 174 N.E. 441 (N.Y. 1931); *Renn v. Provident Trust Co. of Philadelphia,* 196 Atl. 8 (Pa. 1938); *National Iron & Steel Co. v. Hunt,* 143 N.E. 833 (Ill. 1924); *Landell v. Lybrand,* 107 Atl. 783 (Pa. 1919); *Advance Music Corporation v. American Tobacco Co.,* 268 App. Div. 707, 53 N.Y.S. 2d 337 (1945); *O'Connor v. Ludlam,* 92 F. 2d 50 (C.C.A. 2 1937); *Candler v. Crane, Christmas &*

*Co.* [1951] 2 K.B. 164; 120 A.L.R. 1262; 74 A.L.R. 1153; 34 A.L.R. 67; 8 A.L.R. 462. Certainly there is nothing in the books to suggest that the relationship between a Government employee and a private person will support a claim for damages on account of negligent advice. Moreover, on more than one occasion the courts have denied recovery to a plaintiff who in direct reliance upon negligent representations as to his safety has suffered serious injury. *Holt v. Kolker,* 57 A. 2d 287 (Md. 1948); *Webb v. Cerasoli,* 275 App. Div. 45, 87 N.Y.S. 2d 884 (1949), aff'd 300 N.Y. 603, 90 N.E. 2d 64; *Spurling v. LaCrosse Lumber Co.,* 220 S.W. 707 (Mo. App. 1920).

In the Court below appellants stated and argued a number of grounds of alleged negligence (Pto. 83-87d). Apparently all are now abandoned in favor of a claim of misrepresentation and negligent advice. But to insist, as appellants now insist, that their case depends upon statements rather than conduct is simply to demonstrate that the alleged negligence, even if proved, would not be actionable—certainly not under the Tort Act.

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### C. THERE WAS NO DUTY OWING FROM THE UNITED STATES TO APPELLANTS.

In Oregon, as elsewhere, negligence is actionable only if defendant has a duty to plaintiff. "Actionable negligence must be predicated upon the breach of a legal duty." *Freer v. City of Eugene,* 111 P. 2d 85, 87 (Ore. 1941). "A necessary element of actionable

negligence is the existence of a duty on the part of defendant to protect the plaintiff from the injury complained of." *Todd v. Pac. Ry. & Nav. Co.,* 117 Pac. 300 (Ore. 1911). In its conclusions, the Court below recognized this rule of Oregon law

> "4. Under the law of Oregon there are three requisites for recovery of damages: (a) a duty incumbent upon the defendant, (b) a breach of that duty by the defendant and (c) injury and damage resulting proximately from the breach of duty."

and went on to say:

> "5. Neither the United States nor any of its agents or employees owed a legal duty to protect plaintiffs' property under the circumstances of these cases."

Appellants, to succeed here, must show not only that the no-negligence findings are without record support but also that this no-duty conclusion is against the precedents.

**1. The United States had no responsibility for appellants' property or for the District No. 1 embankments.**

In American government problems of property protection and personal safety are police power problems. They are, therefore, problems for the several states. For, as everyone knows, the United States, under the Constitution, has no police power. *Hamilton v. Kentucky Distilleries Co.,* 251 U.S. 146, 156 (1919); *Patterson v. Kentucky,* 97 U.S. 501 (1878). This means that under the federal system the 1948

flood was an Oregon problem, not a United States problem.[8]

During the high water period Oregon recognized and discharged its police power responsibilities. The state disaster plan was placed in operation (Pto. 58); the Governor's representative was either in Portland or in close touch from Salem (Pto. 58-60); the County Commissioners were active and informed (Pto. 63); the sheriff's office patrolled the embankments (Pto. 61) and advised Vanport residents as to flood conditions (Pto. 62); Mr. Hayes, the sheriff and the Chairman of the Board of County Commissioners, acting in cooperation with Red Cross decided to issue the bulletin and agreed on its contents (Pto. 67). After the failure the Governor declared a state of limited emergency (Pto. 59) and the Oregon National Guard, in cooperation with the State Police and the sheriff, took charge of the area (Pto. 63-64). The following day it was the Oregon Governor, not the United States, who ordered the evacuation of Peninsula District No. 2 (Pto. 60). Thus it is clear enough both in theory and in fact, that if and to the extent any government official had or undertook responsibility for the safety of appellants or their property, those

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[8]This normal distribution of responsibility was not affected by the fact that the United States owned Vanport. The lease from the United States to the Housing Authority of Portland expressly provided that Oregon should retain both civil and criminal jurisdiction over the premises (Ex. 351, p. 28). Since Oregon law was fully applicable at Vanport (Pto. 61) a precinct of the Multnomah County Sheriff's office was established there to enforce it (Pto. 61).

officials were Oregon officials, not employees of the United States.

Just as the United States had no responsibility for the safety of the Vanport residents, it had no responsibility for the strength or integrity of the embankments surrounding District No. 1. The district was organized for the avowed purpose of providing "where necessary, proper and suitable dikes to prevent the overflow of Columbia River and Columbia Slough and Oregon Slough." (Ex. 323). It had full power to construct and maintain levees to prevent flood damage (*United States v. Florea,* 68 F. Supp. 367 (Ore. 1945); *In re Scappoose Drainage District,* 237 Pac. 684, 239 Pac. 193 (Ore. 1925)) and to obtain the necessary funds through tax assessments. 123 O.C.L.A. 122; Pto. 10; *United States v. Florea,* 68 F. Supp. 367, 376 (Ore. 1945). The Government was obligated to pay its share of the expense (Ex. 351, p. 15). Moreover, the Government title to the Vanport property was subject to the "rights of Peninsula Drainage District No. 1 and its employees to enter upon said premises for the purposes of maintaining, altering or repairing the dikes, ditches or other facilities of said District * * * and to take any other reasonable steps necessary to protect said District against leakage, overflow, bank destruction and flood waters" (Pto. 27). Since in May, 1948 the United States neither owned nor controlled the western embankment and since the work done by the Corps on the north and south levees had long since been com-

pleted and the levees returned to the district, the responsibility for the district embankments, wherever it rested, was not with the United States.

**2. The Corps of Engineers owed no duty to appellants.**

Congress has recognized that flood control is in the national interest (33 U.S.C.A. 701a) but it has confined the activity of the Federal Government in that connection to the construction of flood control structures such as dams and levees (33 U.S.C.A. 701o, 702). On May 30, 1948 the Corps had no instruction from Congress to participate in flood fights or to assume responsibility for the safety of persons and property in a flood area.[9] This does not mean that the Corps should stand idle during a flood. The Corps, because of its construction work, has in its employ engineers equipped to provide technical advice on flood fighting problems. It is customary for the Corps to make this advice available to those actually in charge of the flood fight (Tr. 811-3; Ex. 64).

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[9]An appropriation act had provided the Secretary of War with limited funds to use, if he saw fit, for actual rescue work and the maintenance of structures imperiled by flood conditions. 33 U.S.C.A. 701n then read as follows (60 Stat. 652):

> " 'That the Secretary of War is hereby authorized to allot, from any appropriations heretofore or hereafter made for flood control, not to exceed $2,000,000 for any one fiscal year to be expended in rescue work or in the repair or maintenance of any flood-control work threatened or destroyed by flood.' "

This authority, it will be noted, relates only to levee repairs and rescue work, problems unrelated to the problems before the Court. The authority, moreover, is entirely permissive and discretionary and its exercise, therefore, is not subject to Tort Act review (28 U.S.C.A. 2680).

The customary procedures were followed in May, 1948. On May 26, General Walsh wrote to the chairman of District No. 1 (Ex. 331) directing attention to the high water and to the district responsibility in that connection:

> "Your attention is invited to the present high water in the Columbia River which will necessitate levee patrolling and maintenance by your Drainage District in order to prevent flood damage to the levees.
>
> "The Drainage District is responsible for the operation and maintenance of all the flood control works in compliance with Peninsula Drainage District Resolution dated September 25, 1939.
>
> "This office is pleased to note that the stop-log structure near Swift's plant is being made ready for immediate placing of logs."

The chairman replied (Ex. 332):

> "Referring to your letter of May 28th, calling our attention to necessary steps to be taken in order to prevent flood damage to the levees during the present high water in the Columbia River.
>
> "All industries located within the diked area, and the officials of the Housing Authority of Portland at Vanport are cooperating in the patrolling of the levees, sand bagging levee openings, and doing all possible to keep the seepage water pumped out of the district.
>
> "A committee of three has been set up with power to act during this emergency, and the work is being carried on under their supervision."

The Corps representatives, Mr. Doyle and Mr. Dibblee, received instructions "to go to Peninsula Drainage Districts Nos. 1 and 2 and contact the local interests, local supervisors there, in an advisory capacity in regard to the protective measures that were being performed in their flood fight, and to determine as best I could as to whether these procedures were correct and advise them as to their procedures and report conditions back to our District Engineer's office." (Tr. 940). They did as they were told. They checked the preparations for the flood fight (Tr. 899); they examined the embankments, particularly the areas at which seepage had developed (Tr. 499-511, 514-526); they provided technical advice as to the proper treatment of seepage, boils and blisters (Tr. 900-901, 942); and they shared the common conclusion that Vanport did not appear to be in danger (Tr. 903, 945). But this is all. No Corps representatives had or purported to have charge of the flood fight (Tr. 823). No Corps representative attended the planning meetings, the meetings of Wednesday and Friday at the Portland Union Stockyards (Pto. 69-70) and the Red Cross meeting of Saturday afternoon (Pto. 67). No Corps representative communicated with any appellant during the flood period. (Tr. 32, 42, 58, 74, 85, 104, 112, 123, 133, 139, 144, 152, 162, 168, 176, 185, 195, 209, 220, 232, 241, 249, 260, 267, 278, 286, 291, 307, 313, 340, 349, 355, 539).

Employees of the United States have only such duties as Congress imposes upon them. Since Congress had imposed no flood fighting duties on the

Corps, the Corps representatives had no duty or obligation to appellants. In the absence of that duty or obligation, negligence of the Corps representatives, even if it could be proved, would be immaterial.

**3. The United States as owner of Vanport had no flood fighting duties to appellants.**

Appellants lay great emphasis on the fact that the Vanport premises—the land, the buildings, and the apartment furnishings—belonged to the United States (Pto. 32). They insist this means that the relation between appellants and the Government was that of landlord and tenant and that out of that relationship there arose some sort of duty on the Government to protect appellants from flood damage. The premise is unsound and even if it were correct the conclusion would not follow.

On May 30, 1948 and for some years prior thereto the Vanport premises had been leased to the Housing Authority of Portland (Exs. 349-356). HAP was created on December 11, 1941 by resolution of the City Council of Portland acting under the Oregon State Housing Authorities Law (Pto. 34). In accordance with the statute, the Portland mayor appointed five commissioners (later increased to seven upon an amendment of the statute) to manage and direct the Authority (Pto. 34). All the HAP commissioners have been prominent Portland residents familiar with housing problems (Pto. 35). They are not Government officials nor in the employ of the United States (Pto. 47).

The lease (Ex. 351) from the United States to HAP is in every respect a conventional, formal instrument of lease. It conveys the premises (par. 1), describes the term (par. 2), provides for rent (par. 3), deals with operation of the property, budgets, accounts and deposits of funds (pars. 4, 5, 6, 7), obligates the lessee to maintain the premises (par. 8), provides for inventories and bonds (pars. 9, 10), forbids assignments (par. 11), provides for surrender of the premises at the end of the term (par. 12), obligates the lessor to make certain advances (par. 13), provides for peaceful possession and payments in lieu of taxes (pars. 14, 15), recognizes the title of the lessor (par. 17), protects officers of the lessee from personal liability (par. 18), provides for termination on total destruction of the premises (par. 19), provides for re-entry on default (par. 20) and for arbitration of controversies (pars. 21, 22). It includes the conventional provisions of government contracts relating to war powers, the personal interest of members of Congress and government employees (pars. 23, 24, 25), it makes provision for notices and automatic renewal (pars. 26, 27) and, finally, it preserves the civil and criminal jurisdiction of local law (par. 28).

The rent to be paid by HAP under the lease is the net profit, determined quarterly, from the operation of the projects subject to the lease (par. 2). The United States, in turn, covenants to protect HAP from any loss on the operation and to advance operating capital (par. 13). Since the financial risk of the

operation is thus on the United States, the lease requires a detailed budget of HAP operations to be approved in advance by FPHA (Ex. 351, par. 5; Ex. 361). Each year prior to the Vanport flood the lease projects operated at a profit and substantial sums were paid to the United States as rent (Pto. 43).

Appellants, like other Vanport tenants, occupied their apartments pursuant to a form of "revocable use permit" prepared by the HAP lawyer and approved by FPHA (Pto. 51). This permit named HAP as landlord (Ex. 395). It made no reference to the United States or to any Federal agency (Exs. 386, 395, 397). The tenants made their rental arrangements with, paid their rent to and conducted all negotiations in connection with the occupancy of their dwelling units with representatives of HAP (Pto. 52). Each of the Vanport tenants received on arrival a "Resident Handbook" (Ex. 393) stating that he held his apartment under lease (pp. 1-2), that the apartment and the furniture within it belonged to the United States (p. 3), that "the Housing Authority of Portland is your landlord" (p. 4), and that the lease signed by him "states your legal rights and responsibilities" (p. 5).

In Oregon "there are three essential elements of a lease, namely, description of the property, duration of term and rental consideration." *Young v. Neill,* 220 P. 2d 89, 91 (Ore. 1950); *Bevan v. Templeman,* 26 P. 2d 775, 778 (Ore. 1933). Each of the leases—the lease from the United States to HAP and the sub-

lease from HAP to appellants—fully satisfies these requirements. This means that HAP, not the United States, was the landlord of appellants. For this reason, if for no other, appellants cannot found their claims against the United States on the law of landlord and tenant.

A second reason why appellants can make nothing of the law of landlord and tenant lies in the fact that appellants are not complaining about the condition of the apartments in which they lived. Appellants argue as though the landlord-tenant relation were a status relation following the parties wherever they go. This is not true. The premises aside, landlord and tenant are in law strangers to each other. They have no general obligations one to the other. They are not fiduciaries. The landlord does not stand in *loco parentis* to the tenant. The law of landlord and tenant is the law of the premises. Only there does it create rights and duties.

The damage to appellants was not caused by any defect in the premises. The damage resulted from the failure of the western embankment. But the western embankment was not leased to appellants. A lease does not carry with it adjacent property of the lessor (*Killian v. Welfare Engineering Co.,* 66 N.E. 2d 305 (Ill. App. 1946); *Owsley v. Hamner,* 227 P. 2d 263, 267 (Cal. 1951); *Jackson v. Birgfeld,* 56 A. 2d 793, 795 (Md. 1948)) much less an embankment a quarter of a mile away in which the lessor has no interest whatever. As *tenants,* appellants must argue about their apart-

ments. Compare *Doyle v. Union Pacific Railway Co.,* 147 U.S. 413, 422 (1893). They make no such argument and therefore they assert no claim as *tenants.*

The cases, moreover, make it clear that a landlord has no flood fighting duties to his tenant. *Doyle v. Union Pacific Railway Co.,* 147 U.S. 413, 423 (1893) illustrates the rule. There plaintiff, by agreement with defendant, occupied a section house "built near the base of a high and steep mountain and in a place subject to snowslides and dangerous on that account." Defendant knew of the snowslide danger but plaintiff did not. A slide destroyed the section house, injuring the plaintiff and killing her children. The trial court, in effect, directed a verdict for defendant. Plaintiff contended this was error, since on the evidence the jury would have been entitled to find that defendant was negligent in failing to warn plaintiff of the snowslide danger. The Supreme Court affirmed the judgment for defendant, saying:

> "It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes or snow-slides."

The rule of this case, that a landlord, *as landlord,* is not responsible to the tenant for storm damage, is the law of Oregon. The Court below considered the Oregon cases and so concluded:

> "15. Under the law of Oregon a landlord has no duty to protect his tenants against fire, floods or other public calamities."

The District Court opinion explains (109 F. Supp. 225):

> "No case has been cited or found in Oregon or elsewhere which holds the landlord for a break in a dike holding back the flood water of a natural stream, whether the embankment was a part of the demised premises or not.
>
> "The tenant has no obligation to lease a particular house in a particular location. If he is attracted by cheap rent, he might consider whether there are other drawbacks."

A tenant in Oregon, as elsewhere, takes the premises as he finds them and without warranty that they are habitable or fit for the purpose intended. Two Oregon decisions, *Stovall v. Newell,* 75 P. 2d 346 (Ore. 1938), and *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943), illustrate the rule. In *Stovall* the tenant was injured when the handle of a water faucet suddenly broke in his hand. The landlord a few hours earlier had leased the premises to the tenant, assuring him that "Everything was okey." The Oregon Supreme Court reversed a judgment for the tenant and held that there was no showing of negligence on the part of the landlord, that a landlord does not insure the tenant's safety and that the affirmative representations as to the condition of the apartment were mere seller's talk not to be accepted as a warranty. In *Asheim* the

lease obligated the lessors to keep "the walls and ceilings and floors * * * in good order and repair and in safe condition during the term of this lease." Plaintiff, an employee of a subtenant, was injured when, without warning, the ceiling collapsed. He argued that defendants were negligent in failing to inspect the ceiling and that in any event they had covenanted to keep the premises safe. The trial court judgment for defendants was affirmed. The Oregon court held, among other things, that a landlord does not insure the safety of his tenant, that the covenant to keep the premises safe was only a covenant to repair and to use due care in that connection, and that there was no negligence in failing to discover the weakness in a ceiling which appeared to be sound and strong.

This decision demonstrates the distance by which appellants fail to prove a claim under the Oregon law of landlord and tenant. In *Asheim* the landlord had covenanted to keep the premises safe. Even so the tenant did not succeed, for the ceiling fell without warning or prior indication of weakness. The western embankment at Vanport fell without warning or prior indication of weakness. In Oregon, therefore, the United States would not be liable even if it had agreed with appellants to maintain the premises in a safe condition. There was, of course, no such covenant.[10]

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[10]The Oregon rule that a landlord does not warrant or insure the safety of his tenant is the accepted rule of the common law. " 'Since the tenant is bound to inspect beforehand, and is subject

There is nothing in the Oregon decisions cited by appellants which conflicts with or qualifies *Stovall* or *Asheim*. Appellants' first case, *Garrett v. Eugene Medical Center,* 224 P. 2d 563 (Ore. 1950) illustrates the familiar rule that a landlord who leases portions of a building to various tenants, retaining control of hallways and elevators, must use due care to keep the hallways and elevators in good condition. The second

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to the rule of caveat emptor, and the landlord owes no duty to repair, the latter is, in general, not liable for injuries to the tenant or his property resulting from the construction or condition of the demised premises.' " *Conradi v. Arnold,* 209 P.2d 491, 498-9 (Wash. 1949). " 'In the absence of warranty, deceit or fraud on the part of the landlord, the rule of caveat emptor applies to leases of real estate, the control of which passes to the tenant, and it is the duty of the tenant to make examination of the demised premises to determine their safety and adaptability to the purposes for which they are hired.' " *Jespersen v. Deseret News Pub. Co.,* 225 P.2d 1050, 1053 (Utah 1951). "The rule is well established that, as to structural defects, the tenant ordinarily takes the demised premises as he finds them, and a landlord is not liable for injuries caused thereby." *McLain v. Haley,* 207 P.2d 1013, 1015 (N.M. 1949). "In the ordinary lease of real estate there is no implied warranty that the premises are fit for occupancy or for the particular use contemplated by the lessee. The lessee takes the premises as he finds them." *Gade v. National Creamery Co.,* 87 N.E.2d 180, 182 (Mass. 1949). "Where the right of possession and enjoyment of the leased premises passes to the lessee, the cases are practically agreed that, in the absence of concealment or fraud by the landlord as to some defect in the premises, known to him and unknown to the tenant, the tenant takes the premises in whatever condition they may be in, thus assuming all risk of personal injury from defects therein." *Caudill v. Gibson Fuel Co.,* 38 S.E.2d 465, 469 (Va. 1946). "Where the landlord surrenders possession and control of the leased premises to the tenant, in the absence of fraud or concealment, the tenant assumes the risk as to the condition of the premises, including the heating, lighting apparatus, plumbing, water pipes, sewers, etc." *Brooks v. Peters,* 25 So.2d 205, 207 (Fla. 1946). "An implied covenant on the part of the landlord that the premises are suitable for the purposes for which they are rented, or that they are in any particular condition, does not arise from the mere renting of the premises." *Croskey v. Shawnee Realty Co.,* 225 S.W.2d 509, 514 (Mo. 1949).

case, *Senner v. Danewolf,* 6 P. 2d 240 (Ore. 1932) holds that a landlord who knows of a dangerous condition on the premises and who does not disclose it is responsible for any consequent damage. In the third case, *Staples v. Senders,* 101 P. 2d 232 (Ore. 1940), the court exonerated the owner of the property when the failure to put guard rails around a trap door was the fault of the lessee. The fourth case, *Longbotham v. Takeoka,* 239 Pac. 105 (Ore. 1925), supports the position for which appellee argues. There the tenant suffered rain damage because of the failure of the landlord to adequately drain the landlord's premises. The defendant was held liable, not as landlord, but because he had interfered with the natural drainage of surface water. Since this surface water drainage rule has no application to flood waters, the case is important only because the Oregon court recognized that the law of landlord and tenant was fundamentally irrelevant.

The obligations of a landlord to his tenant in Oregon, as in most jurisdictions, are well settled and well known. A landlord who knows of a hidden defect in the premises which the tenant is unlikely to discover must pass along this information. *Senner v. Danewolf,* 6 P. 2d 240 (Ore. 1932). The duty arises, however, only with respect to defects in the premises as to which the landlord has notice; and he has no duty to make an inspection. *Stovall v. Newell,* 75 P. 2d 346 (Ore. 1938); *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943). If the landlord leases portions of a building to

various tenants and retains control of hallways and stairways he must use due care to see that the hallways are safe. *Garrett v. Eugene Medical Center,* 224 P. 2d 563 (Ore. 1950); *Pritchard v. Terrill,* 222 P. 2d 652 (Ore. 1950).[11] The third obligation of the landlord is to repair the premises if he has covenanted to do so. *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943).

In each instance, however, the obligation of the landlord arises only after he has notice of the defect. *Stovall v. Newell,* 75 P. 2d 346 (Ore. 1938); *Asheim v. Fahey,* 133 P. 2d 246 (Ore. 1943). Appellants do not contend that the United States had actual notice of a defect in the western embankment. Indeed the whole burden of their argument is that the United States did not have adequate information in that connection. This argument in itself destroys any claim against the Government based on landlord and tenant theories.

Fundamentally, however, the law of landlord and tenant is irrelevant to these cases. For as the Supreme Court held in *Doyle v. Union Pacific Railway Co.,* 147 U.S. 413, 422 (1893), a landlord has no obligation to protect his tenant from storm or flood damage. He does not warrant that the premises are habitable or fit for the purpose intended. The tenant

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[11]Appellants' principal authority, *State of Maryland v. Manor Real Estate Co.,* 176 F.2d 414 (C.A. 4 1949) is a case in which there was a failure to discharge this duty. The court found that employees of the Government had failed, after notice, to exercise ordinary diligence in eliminating typhus carrying rats from the hallways and cellar of the building, that is, from those portions of the building remaining in the control of the landlord.

takes the premises as he finds them and with them the risk, whatever it may be, of fire, flood or other catastrophe.

The reason why appellants prefer to discuss these cases in terms of landlord and tenant is plain enough. Appellants are asking the Court to create an unprecedented liability: to obligate the United States to pay for flood damage. The implications of any such rule must give pause to anyone. Appellants attempt, therefore, to find narrower grounds for decision, reasons which will provide a judgment for them without compelling the United States to pay flood damage generally. But consider what the landlord-tenant argument really means. It means, to take the most obvious example, that every landlord behind the Mississippi levees has some obligation to his tenants with respect to those levees. Boldly stated, it means that he warrants that the premises are safe from levee failure; more cautiously stated, it means that in the exercise of his landlord duties, he must inspect the levees and find them satisfactory; or, at the very least, he must become informed of the condition of those levees and warn his tenants of any danger in that connection. Obviously, no property owner in the Mississippi Valley believes that he has any such obligation. Obviously, the law thus far recognizes no such obligation. But appellants' argument, if it means anything, goes even further. It means in the last analysis that every landlord has duties with respect to his tenant which extend beyond the premises, up and down the block, through-

out an area and in a manner totally undefined. This doctrine, if accepted, would revolutionize all accepted notions of landlord-tenant rights and obligations. If there is reason for caution in creating unprecedented liabilities for flood damage, there is at least equal reason to be hesitant about rewriting the law of landlord and tenant as appellants suggest.

**4. The United States owed no duty to appellants on account of the "seizure" of the railroads.**

With respect to the "seizure" of the railroads under Executive Order No. 9957, the Court below found:

> "9. On May 30, 1948, the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company were under technical 'seizure' by the United States in connection with a labor dispute resulting in an alleged national emergency. The 'seizure' of the properties of these railroads was a fiction of the flimsiest kind. That 'seizure' did not in fact affect in any way the ownership or control of the railroads or their properties, including the ownership or control of the western embankment at Vanport. No duty on the part of the United States to maintain the western embankment for flood protection purposes, or at all, arose out of this so-called 'seizure.' Moreover, no act or omission of any employee of the railroads has been proved which constituted negligence. The officers and employees of the railroads, whether under federal control or not, acted in the light of all available knowledge as to the construction of the fill, the materials used and the nature of the un-

derlying ground. As operators of railroads they acted with respect to the safety of their passengers and freight under a duty almost absolute. Yet trains passed over this fill at the regularly established intervals all during the flood period and up until half an hour before the break occurred. The United States did not build, maintain or operate the western embankment and had no responsibility therefor. Inspections of the embankment were made with meticulous care. Precautions were taken. All the indicia of disaster now pointed up by the event were appraised at the time by the railroads' representatives in the light of their duty to their own passengers and freight and of their knowledge of the nature of the fill. The event proved them wrong but not negligent."

This conclusion, that the "seizure" was "a fiction of the flimsiest kind" and that it did not, in fact, affect ownership or control of the western embankment is abundantly supported by the record. Whatever the situation may have been with respect to other railroads and other railroad employees, this record demonstrates that in Portland the so-called seizure was only a formality and a thin one at that.

The circumstances are these:

On January 16, 1948, three railroad brotherhoods issued a strike call for February 1 to enforce wage demands (Pto. 75). Efforts to settle the dispute were unsuccessful (Pto. 75) and on April 20 the unions gave notice their members would strike May 11 (Pto. 75). On May 10 the President issued Executive

Order No. 9957 providing for operation by the Secretary of the Army of the properties of the important railway carriers, including the Union Pacific and the S. P. & S. (Pto. 75).

Army representatives were sent to the operating headquarters of each of the railroads named in the order (Pto. 76). On or about May 10 a captain and two assistants came to the Portland office of the S. P. & S. (Pto. 76) and at about the same time three Army representatives arrived at the Portland office of the Union Pacific (Pto. 77). The Army officers did not participate in any way in the management of the railroad companies (Pto. 76-77). They did no more than to file daily reports calling attention to anything unusual in the operations of the preceding day and otherwise simply noting that operations were normal (Pto. 77). The Army representatives did not participate in the 1948 flood fight or in anything which the railroad companies did or did not do in that connection (Pto. 77).

The Executive Order did not require the railroad companies to alter, nor did the railroad companies in fact alter their normal relations with their employees (Pto. 77). The duties, responsibilities, methods and sources of pay, and methods and sources of supervision of the railroad employees were entirely unaffected by the Order (Pto. 78). The railroad company employees did not take an oath of loyalty to the United States; they did not acquire civil service status; they did not participate in the Federal Employees Retirement Plan; they did not receive the

customary rates of pay for government employees; they were not paid from funds belonging to the United States (Pto. 78). During the seizure period the Army issued four general orders to the carriers (Pto. 78), one of which provided that the carriers would remain subject to suit (Pto. 79).

Negotiations between the carriers and the unions continued during May and June, 1948, and on July 8, 1948 the wage dispute was settled (Pto. 79). The railroads then entered into agreements with the United States whereby, among other things, the United States waived any right it might have to an accounting from the carriers and the carriers in turn undertook certain obligations to indemnify the Government (Pto. 79).[12]

Under these circumstances, it seems clear that the Union Pacific and the S. P. & S. did not become federal agencies or their employees federal employees within the meaning of the Tort Act. The seizure had

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[12]Referring to the period of Government seizure the indemnity agreement signed by the Union Pacific and the S.P. & S. provided:

> "* * * the carrier agrees to indemnify and hold the United States, its officers, agents and employees harmless against any liability arising out of or in connection with said possession, control or operation, and agrees to defend at its own cost and expense any such parties in any action or claim arising out of or in connection with such possession, control or operation."

When the complaints below were amended to refer to and rely upon the so-called seizure of the railroads, the Government moved for leave to file and serve a third party complaint calling attention to the indemnity obligations of the roads and praying that if and to the extent the plaintiffs had judgment against the United States, the United States should have judgment over against the railroad companies. The Court denied the motion. In the opinion of the Government, the motion was well taken and should have been granted. See Rule 14 of the Federal Rules of Civil Procedure.

a specific and limited purpose: to keep the roads in operation pending settlement of the labor controversy. The Executive Order specifically provides that the carriers are "to continue their respective managerial functions to the maximum degree possible consistent with the purposes of this order" 13 F.R. 2503. As far as these particular roads were concerned, there was, as a practical matter, no seizure at all.

Certainly there is nothing in the Tort Act or in its legislative history to suggest that Congress intended to assume liability for the negligence of employees of companies temporarily "seized" to prevent prejudice to the national interest. This seems particularly true where, as here, the companies during the seizure remained subject to suit for negligence of their employees (Pto. 79). General Order No. 4 was careful to provide that "Until further order carriers will remain subject to suit as heretofore * * *." (Ex. 415). The purpose of the Tort Act was to waive sovereign immunity and to permit a recovery where prior to the Act no recovery was possible. The railroads, neither before nor after the Government seizure, had the benefit of the sovereign immunity doctrine; and accordingly, there is no reason to suppose that the statute was intended to apply in such cases.

Another reason why the seizure of the roads imposed no duty on the United States lies in the fact that the railroad companies themselves, and hence the United States to the extent it became their successor, had no duty to appellants. The railroad fills which

constituted the western embankment were completed by 1918 (Pto. 16-19). Appellants arrived at Vanport more than twenty years later. The Oregon Supreme Court has recently held that one who acquires property in the light of an existing use of neighboring property takes the situation as he finds it. In *East St. Johns Shingle Co. v. City of Portland,* 246 P.2d 554, 566 (Ore. 1952), the court said, "The uncontradicted facts disclose that the plaintiffs, by reason of their own knowledge of the conditions of which they complain, purchased their properties cum onere." The railroad fills were built for railroad purposes. Appellants, by taking up residence behind those fills, could not create any obligation on the railroads to maintain the fills as flood control structures.

Indeed, if the western embankment had been built in the first instance not for railroad but for flood control purposes, the railroad companies would, nevertheless, have no obligation to maintain that embankment carefully or at all for the benefit of appellants. The Court below considered the cases and concluded:

> "14. Under the law of Oregon a person who erects a dike or embankment for flood protection or other purposes has no duty under the circumstances of these cases to maintain that dike or embankment carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect."

The suggestion that one who builds an embankment for flood protection purposes thereby acquires an

obligation to maintain that embankment for the benefit of his neighbors has not often been made, but on each such occasion it has been rejected. "The fact that a landowner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances or set of circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions." *Weinberg Co. v. Bixby,* 196 P. 25 (Cal. 1921). "But it is inconsistent with any sense of fairness or logic to assume that a landowner must by the maintenance of an artificial embankment protect his neighbor below from waters of any character which otherwise would flow upon the lower proprietor's estate." *Vollrath v. Wabash R. Co.,* 65 F. Supp. 766, 772 (D.C. Mo., 1946). "The only basis upon which plaintiff could rightfully claim injury for this action would be on the theory that the spillway, having once been set at a higher elevation and with a narrower outlet, gave plaintiff a vested right in having it maintained in that original condition. We believe this position is untenable." *Ireland v. Henrylyn Irr. Dist.,* 160 P.2d 364, 365 (Colo. 1945). See also *Whitcher v. State,* 181 A. 549, 552 (N.H. 1935); *Branch v. City of Altus,* 159 P.2d 1021 (Okla. 1945); *Savoie v. Town of Bourbonnais,* 90 N.E.2d 645 (Ill. App. 1950).

This rule is the inevitable consequence of the accepted doctrine that flood waters are a common enemy against which each landowner is entitled to protect

himself as he sees fit and without any obligation to adjoining landowners. For cases recognizing this common enemy rule see *Mogle v. Moore,* 104 P.2d 785 (Cal. 1940); *Rex v. Commissioners,* 8 B. & C. 356, 108 Eng. Repr. 1075 (1828); *Cubbins v. Mississippi River Comm'n.,* 241 U.S. 351, 363 (1916); *Southern Pac. Co. v. Proebstel,* 150 P.2d 81 (Ariz. 1944); *Kraus v. Strong,* 227 P.2d 93 (Kans. 1951); *Sinclair Prairie Oil Co. v. Fleming,* 225 P.2d 348 (Okla. 1949); *Bass v. Taylor,* 90 S.W.2d 811 (Tex. 1936); *Leader v. Matthews,* 95 S.W.2d 1138 (Ark. 1936); *Smeltzer v. Borough of Ford City,* 92 A. 702 (Penn. 1914); *Honey v. Bertig Co.,* 150 S.W.2d 214 (Ark. 1941); and in Oregon, *Street v. Ringsmyer,* 216 Pac. 1017 (Ore. 1923); *Morton v. Oregon Short Line Ry. Co.,* 87 Pac. 151 (Ore. 1906); *Price v. Oregon R. Co.,* 83 Pac. 843 (Ore. 1906).

The Court below was correct in concluding that the so-called seizure did not, in fact, make these particular companies agencies of the United States nor the employees of those companies Government employees. The Court below was correct in concluding that even if the United States became the successor to the railroad companies, the United States, nevertheless, had no duty to appellants, since the railroads themselves had no such duty. The Court below was correct in concluding that the railroad employees were not in any respect guilty of negligence or wrongful conduct, even assuming that a duty to appellants existed. Indeed, it seems not unlikely that appellants

themselves agree with these conclusions; otherwise, suits would undoubtedly have been filed against the railroad companies as well as against the United States.

On May 30, 1948, the United States had, so to speak, three relationships with the flood situation. The United States was the owner of Vanport; the employees of the Corps of Engineers were providing technical advice and assistance to those responsible for the conduct of the flood fight; there had been a so-called seizure of the S. P. & S. and the Union Pacific railroads. The Court below decided that no one of these relationships or all of them together imposed any duty on the United States in favor of these appellants. For reasons which this brief has explained, that decision is correct. Under these circumstances, even if negligence had been proved and even if the other defenses of the United States to these claims were unavailable, there could here be no recovery.

**5. The United States assumed no duty to appellants.**

Appellants argue here as they argued below that even if the United States had no duty to them, the representatives of the Corps and of HAP assumed such a duty and failed to discharge it. The District Court rejected this suggestion. As to the Corps of Engineers the Court found:

> "The Corps of Engineers and its representatives neither had nor assumed any obligation to be responsible for the safety of the Vanport resi-

dents or their property and no duty was imposed upon the United States by the activities of the Corps." (Finding 8).

A similar finding was made with respect to the Housing Authority and its employees:

"13. The agents and employees of the United States and of the Housing Authority assumed no duty in connection with the flood situation which they failed to discharge. The bulletin distributed to the residents of Vanport on Sunday morning, May 30, 1948, did not guarantee that Vanport would not be flooded. On the contrary, the bulletin, by describing plans for the evacuation of Vanport, made it clear that a flood was a possibility. It was emphatic in saying that if a flood came there would be no opportunity to remove property situated in Vanport unless one happened to be on the spot at the time and then that only a few valuable possessions and a change of clothing could be saved. There was no holding out or assumption of duty to give the Vanport tenants ample time to evacuate their property. No negligence has been proved in connection with the bulletin or the statements made in it."

These findings are abundantly supported by the record. Since, on their own testimony, no one of the appellants communicated with the representatives of the Corps (Tr. 28-378) obviously the Corps representatives made no promise to them. The bulletin, as the Court below pointed out, promised no more than that in the event an evacuation became necessary an

alarm would be given. It is stipulated that the alarm was given (Pto. 71). What, then, were the commitments to appellants which were not discharged?

Appellants, by arguing for a duty assumed and not discharged, are seeking, of course, to bring themselves within the so-called Good Samaritan rule. The cases make it clear, however, that even if there had been an assumption of duty and a failure to discharge it Good Samaritan principles would not be applicable here. The typical Good Samaritan case is a case in which the employees of defendant, almost always a carrier, take charge of a plaintiff helpless through illness, accident or drunkenness and then fail to use ordinary care in looking after him. See *Layne v. Chicago & A. R. Co.,* 157 S.W. 850 (Mo. App. 1913); *Middleton v. Whitridge,* 108 N.E. 192 (N.Y. 1915); *Kuhlen v. Boston & N. St. Ry. Co.,* 79 N.E. 815 (Mass. 1907). Appellants do not qualify for Good Samaritan protection for at least two reasons. They were not helpless (see *People v. Beardsley,* 113 N.W. 1128 (Mich. 1907); *Osterlind v. Hill,* 160 N.E. 301 (Mass. 1928)) and they were not in the care or custody of the United States. In May, 1948 appellants were adults, in good health, fully capable of looking after their own affairs. They were free to come and go as they saw fit; to take advice from whatever source they found satisfactory; and in general to assume the burden imposed by the law on everyone of using "ordinary care for his own protection." *Carroll v. Grande Ronde Electric Co.,* 84 Pac. 389, 394 (Ore. 1906).

The Good Samaritan doctrine has no application in cases involving public officials. The state and its agencies regularly come to the aid of persons in peril. Frequently that aid is not fully effective. No court has ever held, however, that Good Samaritan considerations are relevant or that a government which attempts more than it achieves is liable for its failures. On the contrary if, for example, a city undertakes to provide fire and police protection, it is not responsible for failure to make that protection adequate even though that failure is alleged to be negligent. *Steitz v. City of Beacon,* 64 N.E.2d 704 (N.Y. 1945); *Stang v. City of Mill Valley,* 240 P.2d 980 (Cal. 1952); *City of Columbus v. McIlwain,* 38 So.2d 921 (Miss. 1949); *Rhodes v. Kansas City,* 208 P.2d 275 (Kans. 1949); 173 A.L.R. 348. Nor is there room under the Tort Act for Good Samaritan relief. Good Samaritan liability, by definition, is predicated upon volunteer activity. Under the Tort Act, however, the liability of the Government is limited to negligence within the scope of federal employment. This eliminates consideration of claims based upon a volunteer effort. *Sanchez v. United States,* 177 F.2d 452 (C.A. 10, 1949). Moreover, as the Court below pointed out, the extent to which, if at all, the Good Samaritan theory "is accepted by decisions of the Oregon courts" is doubtful (109 F. Supp. 225). Certainly appellants can point to no Oregon case in which Good Samaritan principles have been applied in circumstances even remotely resembling those before the Court. Finally, it is settled, of course, that the Good Samaritan, even

when the rule applies, is not an insurer. The obligation is discharged if he does the best he knows how or if he leaves the plaintiff in no worse condition than he found him. *Owl Drug Co. v. Crandall,* 80 P.2d 952 (Ariz. 1938); *Pennsylvania R. Co. v. Yingling,* 129 Atl. 36 (Md. 1925). The no-negligence findings of the Court below are, therefore, a complete answer to appellants' Good Samaritan argument just as they are a complete answer to these claims in every other aspect.

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### D. THE UNITED STATES CANNOT BE HELD LIABLE FOR THE NEGLIGENCE OF HOUSING AUTHORITY EMPLOYEES.

Appellants argue that the employees of the Housing Authority were negligent and that the United States is responsible for the resulting damage (Br. p. 16). There was in fact no negligence on the part of HAP and its employees. The District Court so found (Finding No. 11) and the record thoroughly supports this due care conclusion. Throughout the flood period the HAP representatives showed great diligence and good sense. They collected men, equipment and materials for the flood fight (Tr. 567-9); they established an elaborate patrol system along the embankments (Tr. 571-4); they took advice on technical matters from representatives of the Corps of Engineers, persons competent to advise them (Tr. 677-8, 736-40); they were prepared to give an alarm if the occasion arose (Tr. 570-1); and at the suggestion of the representatives of the Governor, the sheriff, the County Commis-

sioners and Red Cross, they distributed the bulletin to the Vanport residents (Pto. 67). There is here no negligence.

But even if the HAP representatives were in some respect negligent, appellants could not, on that account, maintain an action against the United States. To prove a case under the Tort Act, a plaintiff must demonstrate a negligent or wrongful act or omission "of any employee of the Government while acting within the scope of his office or employment * * *" 28 U.S.C.A. 1346(b). Within the meaning of this section "'Employee of the government' includes officers or employees of any federal agency * * *" 28 U.S.C.A. 2671. "'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C.A. 2671. The Court below concluded that the Housing Authority was, in effect, project manager for the United States at Vanport, and in that sense a federal agency. This is not necessarily a determination that the United States would be responsible for the torts of HAP employees. The fact is that no such responsibility exists.

The Housing Authority, created by the Portland City Council acting under the Oregon State Housing Authorities Law (Pto. 34), is a quasi-municipal corporation and an agency of Oregon. See *Wickman v. Housing Authority of Portland,* 247 P.2d 630 (Ore.

1952).[13] Since it was first created, HAP has owned and operated a 400-dwelling unit, low-rent project located in Portland known as Columbia Villa (Pto. 36). It has also leased from the United States some fifteen war housing projects (Pto. 39) including Vanport. HAP's interest in Vanport depends entirely upon a formal agreement of lease (Ex. 351) by the terms of which the financial risk of the operation is on the United States (Ex. 351). This financial arrangement does not mean that agreement is any less a lease. Compare *Ault Wooden-Ware Co. v. Baker,* 58 N.E. 265 (Ind. App. 1900); *Van Avery v. Platte Valley Land & Inv. Co.,* 275 N.W. 288 (Neb. 1937); *In re Owl Drug Co.,* 12 F. Supp. 439 (D.C. Nev. 1935); 170 A.L.R. 1113. In Oregon, "there are three essential elements of a lease, namely, description of the property, duration of term, and rental consideration." *Young v. Neill,* 220 P.2d 89, 91 (Ore. 1950); *Bevan v. Templeman,* 26 P.2d 775, 778 (Ore. 1933). The HAP lease meets and more than meets these requirements.

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[13]For other decisions to the same effect see *Brammer v. Housing Authority of Birmingham District,* 195 So. 256 (Ala. 1940); *Denard v. Housing Authority of Ft. Smith,* 159 S.W. 2d 764 (Ark. 1942); *Kleiber v. City and County of San Francisco,* 117 P. 2d 657 (Cal. 1941); *People v. Newton,* 101 P. 2d 21 (Colo. 1940); *Edwards v. Housing Authority of City of Muncie,* 19 N.E. 2d 741 (Ind. 1939); *Spahn v. Stewart,* 103 S.W. 2d 651 (Ky. 1937); *State ex rel. Porterie v. Housing Authority of New Orleans,* 182 So. 725 (La. 1938); *Laret Inv. Co. v. Dickmann,* 134 S.W. 2d 65 (Mo. 1939); *State ex rel. Great Falls Housing Authority v. City of Great Falls,* 100 P. 2d 915 (Mont. 1940); *Lennox v. Housing Authority of City of Omaha,* 290 N.W. 451 (Neb. 1940); and *Wells v. Housing Authority of City of Wilmington,* 197 S.E. 693 (N.C. 1938).

The argument that HAP is a federal agency and not, as it appears to be, an agency of Oregon leasing property from the United States, depends to a large extent on certain releases issuing from the Federal Public Housing Authority in Washington and addressed to such local housing authorities as HAP. These releases are part of a so-called Manual of Policy and Procedure created by FPHA early in 1942 (Pto. 44). The Manual is designed (a) to express FPHA policy and requirements on subjects which, under the lease agreements, are for FPHA decision or approval; (b) to express the views of FPHA on subjects which are for decision by the local housing authorities but which involve the fundamental policy of the housing program; and (c) to provide information which may be of use to the local authorities (Pto. 44). The Manual is prepared in loose-leaf fashion (Pto. 44). From time to time FPHA distributes new mimeographed releases to be inserted in the Manual (Pto. 44). These releases are general in terms in the sense that they are not directed to any particular person or any particular housing authority (Pto. 45). The subjects covered by the releases are as follows: (a) budget and expense, including accounting; (b) care of and accountability for government property, including property in a terminated or stand-by status and including the disposition of such property; (c) selection of tenants and rental arrangements; (d) rental rates; (e) community services; (f) commercial operations on the projects; and (g) reports (Pto. 45). The

Manual relates to all housing operations in which FPHA has an interest, including both low rent and war housing (Pto. 45). As of any given date, therefore, all the releases in the Manual are not applicable to any particular project (Pto. 45). On May 30, 1948, there were approximately 125 releases in the Manual relating to projects such as Vanport (Pto. 45).

Appellants' assertions notwithstanding, these releases do not demonstrate that the United States controlled the HAP operation. On the contrary, the releases, in every instance, are responsive to and consistent with the lessor-lessee arrangement. During the war FPHA, with scores of such leases throughout the country, naturally wished to standardize accounting, reports and procedures. This, and only this, the releases accomplished. They did not interfere with local management and they did not modify the basic lessor-lessee arrangement.[14] Moreover it is Congress and not the author of an FPHA release who decides what is and what is not a federal agency. And Con-

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[14]A number of the releases are in the record. Some of them (Exs. 105, 117) are dated after May 30, 1948; others (Exs. 93, 97, 108, 109) were rescinded or replaced prior to May 30; and others (Exs. 98, 99) relate only to construction operations. Two of the releases (Exs. 94, 101) have to do with the Hatch Act which by its terms applies to state employees working on projects financed in part by the United States. One (Ex. 95) relates to in-grade promotion of FPHA employees and, as the numbering system indicates, has no applicability at Vanport. One (Ex. 96) relates to personnel policies but, as the exhibit itself makes clear, all the significant decisions, such as salary rates, vacation periods, etc., are left for local authority determination. One (Ex. 102) relates to the lease requirement that the local authorities carry public liability insurance. One (Ex. 104) relates to the prevailing wage requirements of the United States Housing Act of 1937. One (Ex. 106) encourages local authorities to provide community services to

gress has made it plain that local housing authorities such as HAP are not part of the Federal Government.

In 1937 Congress declared its purpose with respect to low-rent housing to be "to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions * * * that are injurious to the health, safety, and morals of the citizens of the Nation." (42 U.S.C.A. 1401). To this end Congress provided for loans (42 U.S.C.A. 1409), annual contributions (42 U.S.C.A. 1410) and capital grants (42 U.S.C.A. 1411) "to public housing agencies", that is, to

> "(11) The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the Administration), which is authorized to engage in

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their tenants without undertaking to specify what those services should be.

Since the United States had the ultimate financial risk with respect to the operation of the properties, a number of the releases have to do with financial matters: Accounting problems (Ex. 107), uncollectible accounts (Ex. 114), damage claims (Ex. 103), budgets (Exs. 120, 121) and rents (Exs. 125, 126). The property at Vanport belonged to the United States and HAP as lessee was responsible for it. Accordingly, releases were issued having to do with inspection systems and fire hazard (Exs. 110, 111, 112), records and inventories (Exs. 131, 132, 139), surveys in event of fire (Ex. 133), thefts and bonding of employees (Exs. 135, 136), maintenance problems (Exs. 106, 137, 138) and the disposition of surplus properties (Exs. 127, 128, 129, 130).

Since it was agreed that during the war the tenants should be persons employed in war industries releases were issued relating to tenant eligibility (Exs. 118, 123). Of the remaining exhibits one (Ex. 116) relates to moving expenses of tenants in projects on a terminated status, one (Ex. 119) relates to projects other than war housing projects, one (Ex. 122) relates to the use of the premises for public health purposes and one (Ex. 134) is an index.

> the development or administration of low-rent housing or slum clearance. The Administration shall enter into contracts for financial assistance with a State or State agency where such State or State agency makes application for such assistance for an eligible project which, under the applicable laws of the State, is to be developed and administered by such State or State agency." (42 U.S.C.A. Supp. 1402(11)).

This, obviously, is not a reference to an agency of the Federal Government. It is a reference to an independent organization with whom the United States is authorized to make all manner of contracts (42 U.S.C.A. 1409-15), to whom it may make loans (42 U.S.C.A. 1409) and arrange sales (42 U.S.C.A. 1412) and whose obligations (42 U.S.C.A. Supp. 1421(a)) are to be sharply distinguished from the obligations of the Government (42 U.S.C.A. 1420).

The war brought in its wake a host of housing problems. Congress provided for consultation by Federal representatives with "local public officials and local housing authorities" (42 U.S.C.A. 1545) on questions relating to war housing and authorized FPHA "to rent, lease, exchange, sell for cash or credit, and convey the whole or any part" of a war housing project (42 U.S.C.A. 1544) as it saw fit. Under the circumstances nothing was more natural than for FPHA to lease part of its war housing to local agencies such as HAP. This did not mean that the local authorities were *ipso facto* transformed into federal agencies.

Peace brought an end to the war aspect of the housing program but Congress recognized that in the hands of the local authorities war housing might serve a useful post-war purpose. To this end Congress provided for a conveyance of the Government's interest in certain named war housing projects to "the following local public housing agencies." (42 U.S.C.A. Supp. 1586). In the list is Portland Project No. 35021, known as Dekum Court (Ex. 351), and the authorized conveyance is to "Housing Authority of Portland." (42 U.S.C.A. Supp. 1586). This is, of course, express recognition by Congress that HAP is a "local public housing agency" and not part of the Federal Government.

The legislative history of the Federal housing legislation is all to the same effect. In introducing Senate Bill 1685, which eventually became the Housing Act of 1937, Senator Wagner said (38 Cong. Rec. 1889):

> "All the direction, planning and management in connection with publicly assisted housing projects are to be vested in local authorities, springing from the initiative of the people in the communities concerned. The Federal Government will merely extend its financial aid through the medium of these agencies."

The House Committee on Banking and Currency in its report on S. 1685 said (H. Rep. 1545, 75th Cong., 1st Sess.):

> "General Statement
>
> The bill provides assistance to the States and their political subdivisions in the remedying of

unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families whose income is so low that they cannot afford adequate privately owned dwellings. * * *

Decentralization

In contrast to present housing activities of the Federal Government, the bill contemplates a complete decentralization of the housing program, including the sale or leasing to public agencies of presently owned Federal housing projects. The bill does not authorize the direct Federal construction of any additional housing projects, but provides for a non-Federal program consisting of financial assistance to the states and their political subdivisions in the development and operation of local slum-clearance and low-rent housing projects."

In 1949 Congress carefully reviewed the housing program in connection with the Housing Act of that year. The Senate Committee on Banking and Currency again emphasized that local authorities such as HAP were strictly local organizations and said (S. Rep. 284, 81st Cong., 1st Sess.):

"The public-housing program is administered in the localities by local housing authorities which develop, own, and operate the low-rent projects. These local authorities were created pursuant to State law, and their members are usually appointed by the mayors of the respective localities. Although these local housing authorities have in almost every case enjoyed close and satisfactory relationships with the governing bodies of their

> localities, your committee has nonetheless believed it advisable to insert in the pending bill provisions which will assure that the operations of the local authorities have the general approval and support of their respective local governments.
>
> "The prime responsibility for the provision of low-rent housing is thus in the hands of the various localities. The role of the Federal Government is restricted to the provision of financial assistance to the local authorities, the furnishing of technical aid and advice, and assuring compliance with statutory requirements." (p. 16).

The House Committee on Banking and Currency expressed similar views. (See H.R. No. 590, 81st Cong., 1st Sess., p. 18).

This material, in the Government's judgment, leaves no room for argument. Congress has been very careful to make it clear that local agencies such as HAP must be recognized for what they are, that is, agencies of the several states and not agencies of the Federal Government. This is tantamount to saying that local housing authorities are not federal agencies within the meaning of the Tort Act. The Congressional determination on that point is clear and it is conclusive.

There is in fact no contrary suggestion in the books. Most of the states have housing laws roughly comparable to the Oregon legislation under which HAP was organized. In considering the constitutionality of such legislation careful attention has been given to the position and purpose of the local authorities. Nowhere has there been a suggestion that the author-

ities are part of the Federal Government. See *The Housing Authority v. Dockweiler,* 94 P. 2d 794 (Cal. 1939); *New York City Housing Authority v. Muller,* 1 N.E. 2d 153 (N.Y. 1936); *Opinion of the Justices,* 48 So. 2d 757 (Ala. 1950); *Nashville Housing Authority v. City of Nashville,* 237 S.W. 2d 946 (Tenn. 1951); *Opinion to the Governor,* 63 A. 2d 724 (R.I. 1949); *Dornan v. Philadelphia Housing Authority,* 200 A. 834 (Pa. 1938); *Belovsky v. Redevelopment Authority,* 54 A. 2d 277 (Pa. 1947); *Ryan v. Housing Authority of City of Newark,* 15 A. 2d 647 (N.J. 1940); *City of Phoenix v. Superior Court,* 175 P. 2d 811 (Ariz. 1946); 175 A.L.R. 1069. The courts have also been called upon to decide whether the local authorities are subject to suit. Again there has been no suggestion that they are federal agencies. See *Wickham v. Housing Authority of Portland,* 247 P. 2d 630 (Ore. 1952); *Ryan v. Boston Housing Authority,* 77 N.E. 2d 399 (Mass. 1948); *Housing Authority of Birmingham District v. Morris,* 14 So. 2d 527 (Ala. 1943); *Muses v. Housing Authority,* 189 P. 2d 305 (Cal. App. 1948).

There is nothing in the record or in the precedents to support an argument that HAP is a federal agency. What single characteristic does it have in common with an ordinary federal agency? It was created not by Congress but by the mayor of Portland; it exists not because of a federal statute but because of an act of the Oregon legislature; it is operated not by officers of the United States appointed by the President but by commissioners serving at the request of the Port-

land mayor; it borrows money from and enters into elaborate contracts with the United States, a procedure hardly sensible if HAP were part of the Federal Government. HAP is not a federal agency. The relation of HAP to the United States is strictly that of a lessee to its lessor, a contractual arrangement. The Tort Act provides expressly that "any contractor with the United States" is not to be considered a "federal agency". 28 U.S.C.A. 2671.

Just as HAP is demonstrably a local rather than a federal agency, so the employees of HAP are demonstrably employees of that organization alone and not employees of the United States. As of May 30, 1948, HAP had approximately 675 employees (Pto. 48) all reporting directly or indirectly to the executive director who, in turn, reports to the commissioners appointed by the Portland mayor (Pto. 47). Terms and conditions of employment for HAP personnel are fixed not by Congress but by HAP (Pto. 48). This includes salaries, vacation periods, working hours, rates of pay, etc. (Pto. 48). The application form provided to prospective HAP employees makes no mention of the United States (Pto. 49, Ex. 390). HAP employees receive their pay not from the Treasury but from funds obtained by HAP from rental payments (Pto. 49). This was the source of their pay in May, 1948 (Pto. 49). The HAP checks to its employees are not Treasury checks and they do not refer to the United States (Pto. 49; Ex. 391). HAP employees take no oath of loyalty to the United States; they have no civil service status; they do not

participate in the Federal Employees Retirement Plan; their rates of pay are not affected by general pay increases authorized by Congress for federal employees (Pto. 49). On the contrary they receive the benefits of the Oregon workmen's compensation scheme and approximately two-thirds of them, those engaged in maintenance work, are trade union members (Pto. 49). HAP under its union contracts obtains the help it requires by making demands upon the union (Pto. 49; Exs. 400-404), a method of employment hardly compatible with the civil service system. All employees of HAP receive their instructions from representatives of that organization and not from representatives of the United States (Pto. 47).

There is nothing here to support an argument that HAP employees are Government employees and the decisions in comparable situations are all to the contrary. In *Powell v. U. S. Cartridge Co.,* 339 U.S. 497, 507 (1950) munitions were made for the Government, under close Government supervision, from Government materials in a plant built and owned by the Government. The plant was operated by the Cartridge Co. on a cost-plus-a-fixed-fee basis with the result that the plant employees were paid with Government money. Nevertheless, the Court held that those employees were not federal employees:

> "In these great projects built for and owned by the Government, it was almost inevitable that the new equipment and materials would be supplied largely by the Government and that the products would be owned and used by the Gov-

ernment. It was essential that the Government supervise closely the expenditures made and the specifications and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.

"The relationship of employee and employer between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent-contractors to train their working forces, make job assignments, fix salaries, meet payrolls, comply with state workmen's compensation laws and Social Security requirements and 'to do all things necessary or convenient in and about the operating and closing down of the Plant, * * *'

* * * * *

"The petitioner-employees and the Government expressly disavow, in their briefs, any employment relationship between them. The managerial duties imposed upon the respondents were the duties of employers. That such duties be performed by private contractors was a vital part of the Government's general production policy. In the light of these considerations, we conclude that the respective respondents, in form and in substance, were the employers of these petitioners within the meaning of the Fair Labor Standards Act."

If employees in a Government plant, paid with Government funds and producing Government munitions under close Government supervision are not United

States employees, how can it be argued that the HAP employees working for an organization organized under state law, paid with private moneys, hired and fired by HAP officials, and subject in their daily activities to no Government supervision are federal employees?

*Powell* was a decision under the Fair Labor Standards Act. Comparable decisions have been reached under the Tort Act. In *Fries v. United States,* 170 F. 2d 726 (C.A. 6, 1948) the United States Public Health Service provided funds and equipment to a county board of health to conduct, in cooperation with the Health Service, a veneral disease survey in an area where troops were quartered. The Government money was to be used, among other things, to hire chauffeurs, one of whom negligently injured the plaintiff. It was held that the United States was not responsible for the reason that the chauffeur was not a "federal employee". In *Lavitt v. United States,* 177 F. 2d 627, 629 (C.A. 2, 1949) plaintiffs owned a warehouse and certain potatoes stored in it. They applied to the United States for a loan under the farm price support program. Under the statute local farmer committees selected inspectors to review loan applications. When plaintiffs' application was received, the local committee appointed inspectors who, in the course of their work, negligently set fire to the warehouse. It was held that the United States was not responsible. The court ruled that the local committee was not a federal agency

> "We think it clear that the Tolland County Agricultural Association is not a federal agency in any way resembling an executive department or independent establishment of the United States and it certainly is not a corporation. Its employees or officers were not and could not be selected by the United States or the Department of Agriculture, or discharged by either." (pp. 629-30)

and that the inspectors were not "persons acting on behalf of a Federal agency":

> "The plaintiffs, however, assert liability on the ground that the inspectors were 'persons acting on behalf of a Federal agency in an official capacity,' and, therefore, governmental employees as defined in 28 U.S.C.A. § 941(b), above quoted. Perhaps they were to some extent acting on behalf of a federal agency as well as the borrowers, but to impose a liability based upon a putative agency over which the principal had no more control than in the present case would stretch governmental responsibility too far and might include all sorts of situations in which the United States required a conditional certification or approval before making a loan. It seems clear to us that the Government had no relation with inspectors chosen by the County Agricultural Association that would impose a liability to suit because of negligent acts on their part. A waiver of governmental immunity must be clear and in our opinion has not been shown in the present case." (p. 630)

There is nothing in the record before the Court, there is nothing in the books to support a conclusion that

HAP is a federal agency or that its employees are federal employees.

Liability under the Tort Act depends upon the rule of *respondeat superior*. *United States v. Campbell,* 172 F. 2d 500, 503 (C.C.A. 5 1949); *United States v. Eleazer,* 177 F. 2d 914, 918 (C.C.A. 4 1949); *United States v. Sharpe,* 189 F. 2d 239 (C.C.A. 4 1951). Under that rule the principal is held responsible for the torts of a servant because he selects the servant and controls his activity. The United States did not select the employees of HAP and did not participate in any way in their day to day activities. Certainly the United States did not direct or control what the HAP employees did or did not do in connection with the flood fight. HAP is not a federal agency; its employees are not Government employees. This means that even if appellants are right and the Court below was wrong in concluding that HAP and its representatives exercised due care during the flood period, no claim could be presented against the United States on that account.

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### E. FLOOD FIGHTING IS DISCRETIONARY ACTIVITY OUTSIDE TORT ACT JURISDICTION.

The Federal Courts have no jurisdiction, under the Tort Act, to award damages pursuant to "(a) any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an

employee of the Government, whether or not the discretion involved be abused." (28 U.S.C.A. 2680(a)). Congress, weary of the burden of private bills, removed the barrier of sovereign immunity to permit certain ordinary torts to reach the courts. But Congress did not intend to shift the traditional distribution of authority between the judiciary and the executive. To waive sovereign immunity is one thing; to permit the courts to reappraise every act or decision of every Government employee is quite another. Congress had no such purpose.

This has now been settled beyond argument by *Dalehite v. United States,* 346 U.S. 15, 35 (1953). That decision, dated subsequent to the decision below in these cases, rejected the Texas City disaster claims on the basis of the discretionary activity exemption of the Tort Act. Mr. Justice Reed said:

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation. *Where there is room for policy judgment and decision there is discretion.*" (Emphasis supplied.)

The last sentence is the key. "Where there is room for policy judgment and decision there is discre-

tion."[15] The situation created by the 1948 Columbia River flood obviously required an hour by hour exercise of judgment and hour by hour attention to flood fighting policy. How many men will the flood fight require? What materials should be on hand? How much equipment will be needed? Where should it be stationed? What provision should be made for an alarm? How could Vanport best be evacuated? How are the Vanport residents to be advised about evacuation plans? Should a bulletin be issued to them? What should the bulletin say? These are clearly policy and judgment questions. In similar fashion every question about the embankments called for the exercise of judgment. What patrols should be established? Who should do the work and how? What of the condition of the embankments? How well have they resisted flood pressure in the past? How well are they resisting flood pressure now? What is the significance of this seepage or that boil? No one of these questions could be answered except on the basis of an informed judgment discretionary and executive in nature.

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[15]Compare *Louisiana v. McAdoo,* 234 U.S. 627, 633 (1914):

> "But if the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government."

And Mr. Chief Justice Marshall in *Marbury v. Madison,* 1 Cranch 137, 170 (1803):

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."

See also *Spalding v. Vilas,* 161 U.S. 483, 498 (1896); *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682, 704 (1949).

Flood fighting and its problems are executive problems calling inevitably for "policy judgment and decision."

Prior to *Dalehite,* the Federal Courts on more than one occasion had rejected flood damage claims on the basis of the discretionary activity exemption of the statute. Mr. Justice Reed, in *Dalehite,* notes those decisions and approves them (346 U.S. 36). They include *Coates v. United States,* 181 F. 2d 816 (C.A. 8, 1950), where plaintiff had suffered $180,000 of damage as a result of alleged negligence of employees of the United States in constructing and operating flood control works along the Mississippi. The complaint was dismissed and the dismissal order affirmed. In *Olson v. United States,* 93 F. Supp. 150 (D.C. N.D., 1950), in *Lauterbach v. United States,* 95 F. Supp. 479 (D.C. Wash., 1951) and in *North v. United States,* 94 F. Supp. 824 (D.C. Utah, 1950), all noted in *Dalehite,* the claims were based upon negligence of Government employees in the operation of a Government dam. In each instance it was held that there was no jurisdiction because of the discretionary activity exemption. See also *Sickman v. United States,* 184 F. 2d 616 (C.A. 7, 1950); *Boyce v. United States,* 93 F. Supp. 866 (D.C. Iowa, 1950); *Toledo v. United States,* 95 F. Supp. 838 (D.C. Puerto Rico, 1951).

The examples could be multiplied but in appellee's judgment no elaboration is required to demonstrate that flood fighting is discretionary in nature and that the decisions of which appellants complain are fundamentally policy decisions. Indeed, it seems unlikely

that there has been any case in the courts which is as clearly within the discretionary activity exemption as these cases.

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### F. ALLEGED NEGLIGENCE OF PUBLIC OFFICIALS DURING A PERIOD OF PUBLIC PERIL IS NOT ACTIONABLE.

The *Dalehite* decision, 346 U.S. 15 (1953), recognizes that as a matter of substantive law the activity of public officials in a period of public peril, even though alleged to be negligent, is not actionable. In *Dalehite,* the trial court had found that following the Texas City explosion, the Coast Guard and its officials had been negligent in conducting fire fighting and rescue operations. The Supreme Court held that any such negligence was not actionable. Mr. Justice Reed said of the Tort Act (346 U.S. 43)

> "The Act did not create new causes of action where none existed before."

and went on to quote from the opinion in *Feres v. United States,* 340 U.S. 135 (1950):

> "We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

This means that a claim under the Tort Act is valid only if it meets the requirements of the statute and if, as a matter of substantive law, the claim exists. The *Dalehite* case is itself proof that, as a matter of sub-

stantive law, these claims do not exist. In *Dalehite* it was contended that employees of the Government were negligent in fighting a fire. Here it is contended that employees of the Government were negligent in fighting a flood. Both cases, therefore, raise the question as to whether, as a matter of substantive law, alleged negligence of public officials in a period of public peril is actionable. *Dalehite* answers that question no. In doing so it follows and accepts well settled common law principles.

The problem of liability in connection with efforts of public officials to avert a public calamity first arose in cases in which private property was seized and destroyed to protect the public. The rule of the common law was that the owner had no claim. "At the common law, everyone had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner." *Bowditch v. Boston,* 101 U.S. 16, 18 (1879). See, to the same effect, the *Saltpetre* case, 12 Co. Rep. 12, 77 Eng. Repr. 1294; *Surocco v. Geary,* 3 Cal. 69 (1853); *Field v. City of Des Moines,* 39 Ia. 575 (1874); *Dunbar v. Alcalde of San Francisco,* 1 Cal. 355 (1850); *Stone v. The Mayor and Aldermen of New York,* 25 Wend. 157 (1840); *The American Print Works v. Lawrence,* 23 N.J.L. Rep. 590 (1851); and the cases cited in *Dalehite,* 346 U.S. 43. The rule applies to flood fights. "We hold that appellants may not recover for damage caused by acts

of agents of the county in an attempt to control immediate danger from the flood. If it was necessary to use earth from appellants' property in filling sand bags to control the flood, respondents' agents and employees were justified in stripping the topsoil from appellants' property, and appellants cannot recover damages therefor." *Short v. Pierce County,* 78 P. 2d 610, 616 (Wash., 1938).

As the *Dalehite* decision recognizes, the rule against judicial review of emergency action by public officials includes the proposition that alleged negligence on the part of those officials vests no claim in private persons. The modern phrasing of the rule is frequently in terms of a distinction between "governmental" and "proprietary" activity. But whatever the phrasing, the result is the same. There can be no recovery. See, for example, *Perry et al. v. City of Independence,* 69 P. 2d 706 (Kan., 1937); *Cuffman v. City of Nashville,* 175 S.W. 2d 331 (Tenn., 1943); *City of Indianapolis v. Butzke,* 26 N.E. 2d 754 (Ind., 1940); *Brock-Hall Dairy Co. v. City of New Haven,* 189 A. 182 (Conn., 1937); *Barker v. City and County of Denver,* 160 P. 2d 363 (Colo., 1945); *Klassette v. Liggett Drug Co.,* 42 S.E. 2d 411 (N.C., 1947); *Rhodes v. Kansas City,* 208 P. 2d 275 (Kan., 1949); 9 A.L.R. 143; 33 A.L.R. 688; 84 A.L.R. 514.

In a recent collision case arising under the Public Vessels Act the Court of Appeals for the Third Circuit considered and decided a somewhat comparable question. In *P. Dougherty Company v. United States,*

..... F. 2d ..... (1953), the District Court held the United States liable for negligence of the Coast Guard in conducting rescue operations. The Court of Appeals reversed and said:

> "We cannot, however, subscribe to the District Court's ruling of law that the United States is liable for fault of the Coast Guard in conducting a rescue operation at sea.
>
> "We are of the opinion that public policy dictates that the United States should not be liable for fault of the Coast Guard in the field of rescue operations. There are two arrows in the quiver of this public policy. The first may be directed to the inevitable consequence on the morale and effectiveness of the Coast Guard if the conduct of its officers and personnel in the field of rescue operations under the indescribable strains, hazards and crises which attend them, is to be scrutinized, weighed in delicate balance and adjudicated by Monday-morning judicial quarterbacks functioning in an atmosphere of serenity and deliberation far from the maddening crowd of tensions, immediacy and compulsions which confront the doers and not the reviewers.
>
> "In its intramural aspects the Coast Guard functions, as do the other branches of the armed services, on a system of merits and demerits, promotions and demotions based on efficiency or lack of it, in their conduct and operations. A judicial determination that officers or men of the Coast Guard have been negligent in rescue operations would inevitably have a concomitant effect upon their service records. Aware of that fact,

the instinct of self-preservation would inevitably function even under the pressure of life or death crises which so often arise in rescue operations when members of the Coast Guard are called upon to make decisions. If men are to be brought to an abrupt halt in the midst of crisis—to think first that if they err in their performance they may expose their Government to financial loss and themselves to disciplinary measures or loss of existing status, and then to pause and deliberate and weigh the chances of success or failure in alternate rescue procedures, the delay may often prove fatal to the distressed who urgently require their immediate aid. Thus would the point of the second arrow in the quiver of public policy be blunted—the arrow which is directed to preserve in the public interest our merchant marine and that of other nations with which we trade.

"History establishes that tragic losses in men and ships all too frequently attend disasters at sea, and too often is it impossible to give successful succor despite the most gallant and efficient of efforts. To expose the men in the Coast Guard to the double jeopardy of possible loss of their own lives, and loss of status in their chosen careers, because they failed, in coping with the intrinsic perils of navigation, to select the most desirable of available procedures, or their skill was not equal to the occasion, is unthinkable and against the public interest."

Since the rule denying relief for alleged negligence in a period of public peril is a rule of substantive law, it survives, as *Dalehite* makes clear, statutes

such as the Tort Act which waive sovereign immunity. These cases, by express provision of the statute, are governed by Oregon law. 28 U.S.C.A. 1346(b). Oregon has consented, in general terms, to suits against the state "for an injury to the rights of the plaintiff arising from some act or omission of" various public officers. 8 O.C.L.A. 702. Nevertheless, the Oregon courts have consistently held that there can be no action against the state for negligence of Oregon officials acting in a governmental capacity. See *Blue v. City of Union,* 75 P. 2d 977 (Ore., 1938); *Noonan v. City of Portland,* 88 P. 2d 808 (Ore., 1938); *Antin v. Union High School District,* 280 Pac. 664 (Ore., 1929); *Johnston v. City of Grants Pass,* 251 Pac. 713 (Ore., 1926); *Asher v. City of Portland,* 284 Pac. 586 (Ore., 1930); *Wold v. City of Portland,* 112 P. 2d 469 (Ore., 1941); *Morris v. City of Salem,* 174 P. 2d 192 (Ore., 1946). New York, which has recently enacted a statute not unlike the Tort Act, has reached the same conclusion. *Steitz v. City of Beacon,* 64 N.E. 2d 704 (N.Y., 1945). So has California. *Stang v. City of Mill Valley,* 240 P.2d 980 (Cal., 1952).

The significance to these cases of the rule rejecting claims based upon alleged negligence of public officials in a period of public peril cannot be minimized. Appellants, to assert a claim under the Tort Act, must argue that the persons charged with negligence are employees of the United States. They are therefore public officials. Appellants are themselves vigorous in asserting that the peril created by the flood

was immediate and serious. The conclusion is inescapable that these claims are claims based on the alleged negligence of public officials in a period of public peril. The claims, for that reason, could not be allowed even though the negligence was proved. Emergency government action is not subject to judicial review.

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### G. CONGRESS HAS PROVIDED THAT THE UNITED STATES SHALL NOT BE LIABLE FOR FLOOD DAMAGE.

Claims against the United States on account of flood damage are not novel. Floods are one of the most persistent of the nation's problems. The loss is frequently tremendous. The 1948 Columbia River flood caused damage estimated at one hundred million dollars. The property loss in the recent Kansas City flood was approximately two and one-half billion dollars. "The average annual losses from flood damage in the United States have been estimated from 100 to 500 million dollars * * *" (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 6). Congress has always been unwilling to become responsible for flood damage. In response to a suggestion that the Government undertake an indemnity program for the victims of the Kansas City flood, the House Committee said:

> "The budget request includes a proposal to indemnify flood victims for physical loss of or damage to tangible real or personal property up to 80 percent of the amount of such loss, provided that the amount to be paid any one person submitting such a claim does not exceed $20,000.

> The Committee heard considerable testimony on this recommendation, and after careful deliberation has not approved it for several important reasons.
>
> "Congress has never appropriated funds for indemnities such as have been proposed here in any previous disaster of this kind, and no legislation has ever been enacted by Congress authorizing such appropriations. This would be a major departure from the present concept of Government and, therefore, must be given more extensive study than is now possible under emergency conditions that demand prompt action on the part of the Congress. The Committee believes that the approval of the proposed indemnification program would commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster throughout the country regardless of the type or size of the disaster. The financial implications inherent in such an action would be enormous." (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 5.)

The courts have been as unwilling as Congress to "commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster." For many years and in a wide variety of circumstances, claims have been filed under the Fifth Amendment seeking compensation for damage caused by the Government's

flood control operations. They have always been denied. *Bedford v. United States,* 192 U.S. 217, 224 (1904); *Jackson v. United States,* 230 U.S. 1, 23 (1913); *Cubbins v. Mississippi River Commission,* 241 U. S. 351 (1916); *Sanguinetti v. United States,* 264 U.S. 146 (1924); *United States v. Sponenbarger,* 308 U.S. 256 (1939); *Oklahoma v. Atkinson Co.,* 313 U.S. 508 (1941); *Gulf Refining Co. v. Mark C. Walker & Son Co.,* 124 F.2d 420 (C.C.A. 6, 1943); *United States v. West Virginia Power Co.,* 122 F.2d 733 (C.C.A. 4, 1941); *Goodman v. United States,* 113 F.2d 914 (C.C.A. 8, 1940); *Lynn v. United States,* 110 F.2d 586 (C.C.A. 5, 1940); *Franklin v. United States,* 101 F.2d 459 (C.C.A. 6, 1939). This is true even though the Federal officers, as an emergency measure, have dynamited levees, thereby inundating plaintiffs' property. *Hughes v. United States,* 230 U.S. 24 (1913); *Danforth v. United States,* 308 U.S. 271, 287 (1939).

This result does not depend upon doctrines of sovereign immunity or limitations in the Fifth Amendment. The Tennessee Valley Authority is subject to suit. Nevertheless, flood damage claims against it, even though asserted in terms of negligence or wrongful conduct, cannot be maintained. See *Grant v. T.V.A.,* 49 F. Supp. 564, 566 (1942). *Atchley v. T.V.A.,* 69 F. Supp. 952, 954 (1947). The decisive considerations are those of public policy. As Mr. Justice McKenna said in *Bedford v. United States,* 192 U.S. 217, 223 (1904):

> "The consequences of the contention immediately challenge its soundness . What is its limit? * * * And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility."

To the extent that flood damage claims are founded upon the Fifth Amendment, they are, of course, beyond Congressional control. In the area, however, in which Congress is free to act, including the area of these cases, Congress has unequivocally forbidden recognition of such claims. The Court below concluded:

> "19. The provision of 33 U.S.C.A. 702(c) that 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place' is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River; and it was not repealed by the Federal Tort Claims Act."

In denying recognition to any claim against the United States on account of flood damage Congress was unequivocal and emphatic. And Congress meant exactly what it said.

Federal flood control legislation in this country goes back to 1851. In the general appropriation act

for that year Congress provided $50,000 "For the topographical and hydrographical survey of the Delta of the Mississippi * * *" (9 Stat. 523, 539). In 1879 the Mississippi River Commission was created and obligated to prepare for Congress "such plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi River; improve and give safety and ease to the navigation thereof; prevent destructive floods; promote and facilitate commerce, trade, and the postal service; * * *" (21 Stat. 37, 38). In 1893 Congress created the California Debris Commission and instructed it to look into problems of navigability and flood control on California rivers (27 Stat. 507). In 1917 by an Act "To provide for the control of the floods of the Mississippi River and of the Sacramento River, California," Congress appropriated forty-five million dollars to be expended for flood control purposes (at the rate of ten million dollars a year) under the direction of the Secretary of War and in accordance with plans of the Mississippi River Commission and the California Debris Commission (39 Stat. 948). And thus the matter stood until 1927.

In 1927 the Mississippi Valley was devastated by its flood of record. Congress immediately gave consideration to flood control measures, culminating in the Flood Control Act of 1928 (45 Stat. 534) entitled "An Act for the Control of floods on the Mississippi River and its tributaries, and for other purposes."

Section 1 establishes a board of engineers to study Mississippi problems. Section 2 approves the principle of local contribution to the cost of flood control with specific exceptions. Section 3, paragraph one, obligates local interests to provide easements and rights of way and to assume responsibility for the maintenance and operation of the levee structures to be built under the Act. The second paragraph of Section 3 contains the language which now appears as Section 702c of Title 33. That paragraph reads as follows:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

The statute goes on to provide for acquisition of flowage rights by the United States, for participation

of various Government agencies in work to be done under the Act, for distribution of funds in connection with the Mississippi program, for further reports and studies and, finally, for a limitation on the contribution of the United States to flood control measures proposed by the California Debris Commission for California rivers.

The no-liability language of Section 3 came into the Act as a result of a conference between the House and Senate managers and without explanation (see H. Rep. No. 1505, 70th Cong., 1st Sess.). But it is not difficult to identify the source of this provision. President Coolidge in his 1927 State-of-the-Union message (Cong. Rec. Sen., Dec. 7, 1927, p. 106) reviewed the problems created by the 1927 flood, proposed additional flood control legislation, and added words of caution about the position of the Government. He said:

> "It is necessary to look upon this emergency as a national disaster. It has been so treated from its inception. Our whole people have provided with great generosity for its relief. Most of the departments of the Federal Government have been engaged in the same effort. The governments of the afflicted areas, both State and municipal, can not be given too high praise for the courageous and helpful way in which they have come to the rescue of the people. If the sources directly chargeable can not meet the demand, the National Government should not fail to provide generous relief. This, however, does not mean restoration. The Government is not

> an insurer of its citizens against the hazard of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave, which are all too constant in their afflictions. The Government does not undertake to reimburse its citizens for loss and damage incurred under such circumstances. It is chargeable, however, with the rebuilding of public works and the humanitarian duty of relieving its citizens from distress."

This is clear enough: the Federal Government will extend its flood control program and provide relief where relief is needed; but it will not pay for flood damage. Section 3 was intended to put this point beyond argument. And it does so. There is no conflicting view. See *United States v. Sponenbarger,* 308 U.S. 256, 269 (1939); *Kincaid v. United States,* 35 F.2d 235, 246 (D.C. W.D. La., 1929).

Appellants argued in the Court below that Section 702c has no application in the Columbia River Basin. That argument has no force. 1. The 1928 Act, relating as it did to flood control on the Mississippi and Sacramento Rivers, related to all flood control work which the Government had undertaken in the past or was proposing for the future. Hence, in providing against liability in this statute, Congress was, in effect, providing against all liability. 2. The provision itself, referring as it does to "damage from or by floods or flood waters *at any place",* specifically negatives appellants' idea of a limited geographical application. 3. President Coolidge in his message to

Congress was obviously suggesting policy for all flood activities of the Government, wherever located. 4. The Flood Control Act of 1936, which included provision for work in the Columbia River Basin, specifically affirmed all the provisions of the 1928 statute, thus making it plain that Section 702c has full application in the Columbia River Basin. Prior to 1936 the 1928 Act was amended from time to time in minor particulars (46 Stat. 787, 47 Stat. 810, 48 Stat. 607, 49 Stat. 1508); but there was no new general flood control legislation until that year. In 1936 Congress greatly extended the flood control activities of the Government approving many projects, including approximately fifty in the Columbia Basin (49 Stat. 1570, 1589). Congress was careful, however, to reaffirm the principles and provisions of the 1928 Act. Section 8 of the 1936 statute (49 Stat. 1570, 1596) provides:

> "Nothing in this Act shall be construed as repealing or amending any provision of the Act entitled 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes', approved May 15, 1928, or any provision of any law amendatory thereof. * * *"

Thus it is beyond dispute that Congress intended that all provisions of the 1928 Act, including the no-liability provision, should apply in the Columbia Basin. Since 1936 there has been a variety of flood control statutes of one kind or another but nothing to modify this conclusion. (See 52 Stat. 1215, 53 Stat. 1414, 55 Stat. 638, 58 Stat. 887, 60 Stat. 641, 62 Stat. 1040).

Appellants argue that Section 702c has been modified by the Tort Act. This argument, as the Court below concluded, has no merit. 1. The Tort Act did no more than to waive the defense of sovereign immunity. It did not repeal existing acts of Congress or create claims against the United States which did not theretofore exist. *Feres v. United States,* 340 U.S. 135 (1950). 2. By its terms the Tort Act did not repeal or modify Section 702c and the most that could be said, therefore, is that there has been a repeal by implication. "But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy." *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 456 (1945); *United States v. Borden,* 308 U.S. 188, 198 (1939). It is uniformly held, moreover, that a later statute written in general terms, such as the Tort Act, will not (absent an express provision) be construed to supersede an earlier specific statute, such as Section 702c relating to liability for flood damage. "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute." *Rodgers v. United States,* 185 U.S. 83, 87 (1902); *Stewart v. United States,* 106 F. 2d 405, 408 (C.C.A. 9, 1939); *United States v. Hughes,* 116 F. 2d 171, 174 (C.C.A. 3, 1940); *The Town of Okemah v. United States,* 140 F. 2d 963, 965

(C.C.A. 10, 1944); *Home Owners Loan Corporation v. Creed,* 108 F. 2d 153, 155 (C.C.A. 5, 1939).

The provisions of 33 U.S.C.A. 702c are an absolute bar to these claims.[16]

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### H. THE POSITION AND ARGUMENT OF APPELLANTS.

The appellants in the consolidated cases are thirty-eight Vanport residents who came to Vanport on a date and for reasons undisclosed. Since by May 30, 1948 the war was long since over, the Vanport housing no longer served any Government purpose and the appellants were then ordinary civilians holding ordinary civilian jobs, such as automobile dealer (Tr. 54), radio repairman (Tr. 72), laborer (Tr. 97), teacher (Tr. 110), postal clerk (Tr. 120), student (Tr. 128), telephone installer (Tr. 138), accountant (Tr. 155), painter (Tr. 199), secretary (Tr. 215), warehouseman (Tr. 225), salesman (Tr. 270), accountant (Tr. 290),

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[16]Appellants call attention to a single sentence in a committee report referred to in *Dalehite v. United States,* 346 U.S. 15, 29 (1953) discussing the fact that under the discretionary activity exemption of the statute no suit can be maintained "against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid." It is hard to know what this sentence means. The fact is that if the discretionary activity exemption applies, there is no liability under the Act, negligence or no negligence. 28 U.S.C.A. 1346(b). In any event, the committee reference is to an authorized "flood control or irrigation *project*"—something quite different from the flood damage claims to which Section 702(c) refers.

logger (Tr. 304), teacher (Tr. 339) and salesman (Tr. 348).

At the trial appellants conceded that during the flood period they knew Vanport was surrounded by water and that an embankment failure meant that the project would be flooded (Tr. 36, 46, 80, 92, 104-5, 114, 124, 146, 152, 164, 210, 221, 233, 242, 261, 299, 345). This testimony, as the District Court concluded, can mean only one thing: that appellants assumed the risk of flood damage. The Court below found

> "15. Responsibility for the safety of property at Vanport during the flood period rested with the individual owners of the property and not with the United States. Each plaintiff was in a position to obtain full information concerning the height of the flood waters in the Columbia River and it is a matter of common knowledge that floods sometimes overtop and break down protective works and dikes. Under the circumstances each plaintiff had the option of moving his property or gambling upon the coming events. Plaintiffs failed to make a proper choice but that does not create a ground for liability against the United States."

and concluded:

> "16. Under the law of Oregon each plaintiff was responsible for the safety of his property at Vanport during the flood period and each plaintiff, by failing to remove his property from Vanport, took the risk that it might be damaged by flood waters."

There is no escape from this conclusion. The obligation of a defendant to protect a plaintiff is no greater than the plaintiff's obligation to protect himself. "The law imposes upon a person sui juris the obligation to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided." *Carroll v. Grande Ronde Electric Co.,* 84 Pac. 389, 394 (Ore., 1906); *Morris v. Fitzwater*, 210 P. 2d 104 (Ore., 1949). Appellants knew of the high water and that an embankment failure meant a flood. They were entirely free to leave Vanport with their property whenever they saw fit. They chose to stay. They assumed the risk. Compare *Chesapeake & O. Ry. Co. v. Salyer,* 113 S.W. 2d 1152, 1157 (Ky. App., 1938) holding that tenants leasing property subject to overflow assumed the risk of flood damage.

The opening brief argues that under Oregon law the rule of res ipsa loquitur applies to these cases. The Court below reached the contrary conclusion:

> "12. Under the law of Oregon the rule of res ipsa loquitur is not applicable to these cases and in any event there is evidence in the record adequate to rebut any presumption of negligence which might arise out of that rule."

The position of the District Court seems clearly correct. For one thing, the western embankment, the embankment which failed, was not built by the United States and on May 30, 1948 it was in actual fact in the control of the railroad companies and not in the control of the Government. Moreover, information as to the condition of the western embankment was

not in the exclusive control of anyone. The embankment was regularly inspected not only by the representatives of the Corps of Engineers (Tr. 519-21, 499-508) but by the representatives of the district (Tr. 555-7), HAP (Tr. 519-22), the railroad companies (Tr. 864-72, 785-99, 852-57) and, of course, by the Vanport residents themselves (Tr. 794). The res ipsa rule is intended to provide assistance to a plaintiff who has no access to the information relevant to his claim. Here the access of the United States to the facts concerning the western embankment and its failure is no better and no different from the access of appellants to those facts. The res ispa rule, furthermore, only applies in a situation in which on the basis of past experience it can be said with some assurance that absent negligence an accident does not take place. No one could possibly say that as a general thing levee failures are caused by negligence. Finally, the res ipsa doctrine, even where it applies, does not, as appellants seem to think, create a conclusive presumption of negligence. On the contrary, res ipsa does no more than to create an inference, an inference which disappears when the circumstances are fully explained. *Dunning v. Northwestern Electric Co.,* 206 P. 2d 1177, 1191 (Ore., 1949); *Herzinger v. Standard Oil Company,* 190 F. 2d 695 (C.A. 9, 1951). Here the record contains a detailed statement of everything about the western embankment, its history and condition. There is no room for inference or speculation and hence no room for res ipsa considerations.

None of the cases cited in the appellants' brief provides support for their postion. *Maryland v. Manor Real Estate & Trust Co.*, 176 F. 2d 414 (C.A. 4, 1949), the case upon which appellants chiefly rely, presented a situation quite unlike the situation here. Baltimore houses belonging to Manor Co. were leased to the United States acting through Public Housing Authority (PHA). PHA contracted with Dugan to manage the property on its behalf, an arrangement which continued until January 1, 1947. On that date PHA sub-leased the premises to Mazer who assigned his interest to Calvert Village, Inc. Plaintiff's husband moved into the property in February, 1946 and remained there until he contracted typhus and died January 23, 1947. Judgment went in favor of Manor Co., the owner of the premises, and Mazer and Calvert Village, the sub-lessees, on the ground that no negligence on their part was shown. It was held, however, that Dugan was negligent in failing to use due care to eliminate a known infestation of typhus carrying rats and that the United States was responsible for this negligence. The rats were in the basement of the building, a portion of the premises remaining in Government control. Dugan, the person found to be negligent, was a contract employee of the United States.

There is nothing remarkable about this case and nothing about it is of any assistance to appellants. The decision is based on demonstrated negligence by

a Government employee. The duty of the Government arose from the ordinary rule that a landlord who leases portions of a building to various tenants must use due care to keep cellars, stairways and basements in a safe condition. The Vanport situation was not at all comparable. Vanport was not managed by a Government employee. It was leased to the Housing Authority of Portland. The damage to appellants at Vanport did not result from any difficulty with the basement of the apartment buildings. It resulted from the condition of railroad fills for which the United States had no responsibility. Moreover, the negligence of Dugan in the *Manor* case was obvious and flagrant. Here there was no negligence.

Of the other cases cited by appellants three, *Senner v. Danewolf,* 6 P. 2d 240 (Ore., 1932), *Staples v. Senders,* 101 P. 2d 232 (Ore., 1940), and *Garrett v. Eugene Medical Center,* 224 P. 2d 563 (Ore., 1950), are all conventional landlord-tenant cases announcing rules having no application here. *Longbotham v. Takeoka,* 239 Pac. 105 (Ore., 1925) is, as the District Court pointed out, authority for the view that the law of landlord and tenant is irrelevant to the cases before this Court. Appellants cite four more Oregon decisions: *Massey v. Seller,* 77 Pac. 397 (Ore., 1904), which has to do with the liability of the owner of the premises to a business invitee for negligence in failing to guard an elevator shaft; *Boardman v. Ottinger,* 88 P. 2d 967 (Ore., 1939), relating to the liability of

the owner of an amusement park for negligence of his patrons; *Suko v. Northwestern Ice Co.*, 113 P. 2d 209 (Ore., 1941), having to do with liability for damage resulting from the bursting of a tank in which the defendant stored water; and *Gow v. Multnomah Hotel,* 224 P. 2d 552 (Ore., 1950), in which the plaintiff was injured by the collapse of a counter stool. None of these decisions has any bearing upon the problem before this Court. Appellants cite no authority which supports their position. There is none.

Apellants lost their property as a consequence of a flood in the Columbia River, an Act of God. The flood, except for one prior occasion, was of unprecedented proportions. It was tremendously destructive. Four hundred thousand acres of land were inundated, 70,000 people were rendered homeless and the property damage reached $100,000,000. No one can fail to sympathize with appellants and the thousands of others who suffered on account of the flood. Sympathy with appellants, however, is one thing; a conclusion that the United States must pay for the flood damage is quite another. For the reasons explained by the District Court and described at greater length in this brief, no damage claim against the United States exists.

The judgment below was correct and it should be affirmed.

Dated, December 7, 1953.

Respectfully submitted,

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**(Appendix Follows.)**

# Appendix.

## Appendix

*In the District Court of the United States for the District of Oregon*

Civil No. 4420

Solon B. Clark, Jr. and Geraldine A. Clark, husband and wife,
Plaintiffs,
vs.
The United States of America,
Defendant.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

These cases (Nos. 4420, 4449, 4450, 4451, 4468, 4469, 4599, 4607, 4775, 4785, 4882, 4928, 5054, 5122, 5469, 5475, 5484, 5498, 5499 and 5532) were consolidated for trial during August, 1951, before the above entitled Court, the Honorable James Alger Fee, Chief Judge, presiding, and sitting without a jury. The parties appeared by their respective counsel and introduced evidence, both oral and documentary. The cases were briefed and argued and submitted to the Court for consideration and decision. After due consideration the Court, being fully advised, makes its findings of fact and conclusions of law as follows:

## FINDINGS OF FACT.

1. The Court by this reference adopts as part of these findings of fact, the findings of fact in the opinion of the court in the consolidated cases and the statement of agreed facts set forth in paragraphs 1 to 31, inclusive, of Section C of the pre-trial order on file in these consolidated cases.

2. During the early part of the war Vanport, a large housing project located in Multnomah County, Oregon, was built at the expense of the United States to provide housing during the war period for employees of the Kaiser shipyards located in or near Portland, Oregon. Vanport was situated within Peninsula Drainage District No. 1, a municipal corporation organized for drainage and flood protection purposes. The Drainage District was bounded by four embankments: on the north and south by embankments built by the District and rebuilt by the Corps of Engineers of the United States Army; on the east by an embankment supporting an Oregon State Highway known as Denver Avenue; and on the west by an embankment built in the period from 1910 to 1918 by the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company (or their predecessors in interest) for the purpose of carrying trains and not for flood protection. All the land in Peninsula Drainage District No. 1 would have been covered to a considerable depth during mean high water in the Columbia River if it had not been for the three exterior embankments, the embankments on the north, south and west. The United

States, at or about the time Vanport was constructed, condemned and acquired the ownership of about 80% of the land in the Drainage District, including the land on which Vanport was located. The United States also purchased and operated the pumping system of the District.

3. The Columbia River rises in British Columbia and flows 1,210 miles to the Pacific Ocean. It is subject to floods culminating usually in June. In the period from 1858 to 1947 the flow at The Dalles, Oregon, has exceeded 900,000 feet per second in 1862, 1876, 1880 and 1894. These figures are of public record and available to everyone.

4. In May and June of 1948 the Columbia River was in flood. The flood involved both the Columbia River and its tributaries and more than 50 cities and towns were affected. The flood rendered 70,000 people homeless and 5,000 homes were destroyed. More than 400,000 acres were inundated and 41 persons lost their lives. Property damage exceeded $100,000,000. The flood fight involved 475 miles of levees protecting approximately 200,000 acres of land. During the flood more than 10,000 persons, including 1,200 Army troops, Navy personnel, National Guard troops and members of the Coast Guard, participated in the flood fight.

5. The public and private agencies actively engaged in the flood fight or disaster relief at Vanport were the State of Oregon and its agencies, the County of Multnomah and its agencies, the American National Red Cross, the Housing Authority of Portland, the

United States Army Engineers, property owners in the Vanport area, Peninsula Drainage District No. 1, the Sixth Army of the United States and the Coast Guard. The United States Weather Bureau also co-operated in various capacities.

6. At approximately four thirty on Sunday afternoon, May 30, 1948, and when the flood water in the Columbia River stood at an elevation of 30.8 feet, m.s.l., the western embankment at Peninsula Drainage District No. 1 suddenly failed. The failure resulted from a break in the embankment rather than over topping. The failure was so rapid and unexpected that railroad employees who were inspecting the embankment were precipitated into the water. Within an hour the whole Vanport area was flooded. The houses in Vanport were damaged beyond repair and personal property belonging to the Vanport residents, including property of the plaintiffs, was destroyed by water damage as a direct result of the break. Fourteen lives are reputed to have been lost but about 16,000 people were evacuated safely.

7. The western embankment was constructed, owned and operated by the railroad companies and not by the United States. At the point where the embankment failed it had an elevation of 47.3 feet, a crown width of 75 feet and a thickness of 120 feet at the water level. It was much larger in section than the other embankments surrounding Vanport and at the time of failure the water was more than 15 feet from the top of the structure. Although the embankment has been examined in detail, together with

the character of the ground where it was built and the materials and methods used in its construction, the cause of the failure has not been shown and appears to be unknown.

Prior to 1948 the western embankment had withstood the floods of 1933 of 27.7 feet, of 1928 of 27.6 feet, of 1921 of 27.4 feet and other floods of less height. The alleged fact that there were decayed timbers in the fill and that ordinary sand was used in its construction has not been proved to have had any effect. No one thought there was a possibility that the western embankment would fail since it was higher, broader, less subject to pressure of water and was thought to be better consolidated because of the pressure of tremendous weight which it continuously bore. The United States did not own, construct, maintain or operate the western embankment which failed under pressure of the Columbia River Flood waters on May 30, 1948. This embankment had been constructed, maintained and operated by the Railroad Companies for many years and was used for carrying trains of enormous weight up to the very moment of disaster and was not constructed primarily for the purpose of flood control. It was also protected by a highway fill of less height which ran between it and the river under ordinary water conditions. No cause for the failure of the western embankment has been proved. No act or omission of the United States, the Corps of Engineers, the Housing Authority of Portland, the railroads and the agencies, officers or employees of any of them in connection with the flood-

ing of plaintiff's property was without due and ordinary care. No act or omission of any such person or entity above named was the cause of the flooding of the property of the plaintiff.

The Corps of Engineers, the engineers of the railroad companies who had charge of the original construction and present management of the fill, the Housing Authority of Portland and its executive and administrative employees, together with the representatives of the State, community and national relief organizations, as well as individual residents of Vanport who testified at the trial, all saw no reason to apprehend danger and all believed that the western embankment would stand. No care or precaution could have given notice that any break would occur. There has been no proof of negligence in connection with the construction, maintenance or operation of the western embankment.

8. The Corps of Engineers is an agency or instrumentality of the United States in its sovereign capacity. For many years the Corps has helped to protect the nation from floods. Many levees and embankments have been constructed by the Corps or under its supervision. During the 1948 Columbia River flood, as on innumerable other occasions, the Corps, owing to the high competence of its officers and engineers, helped in the effort to control the flood waters not only in the Vanport area but up and down the Columbia River for a distance of five hundred miles. In that connection the Corps gave general publicity to the approaching high water and main-

tained a careful and consistent inspection of the areas and dikes involved, including those at Vanport. Within the limits of available personnel, the Corps also gave technical advice and assistance to those participating in the flood fight. However, the Corps did not take charge of the flood fight at Vanport; nor did the Corps attempt to guarantee the safety of the dikes at Vanport or elsewhere. All the acts done and advice given by the Corps and its representatives and employees in this situation of widespread peril to the public were honest and competent. No negligence on the part of the Corps of Engineers, its employees or representatives, has been proved. The Corps of Engineers and its representatives neither had nor assumed any obligation to be responsible for the safety of the Vanport residents or their property and no duty was imposed upon the United States by the activities of the Corps.

9. On May 30, 1948, the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company were under technical "seizure" by the United States in connection with a labor dispute resulting in an alleged national emergency. The "seizure" of the properties of these railroads was a fiction of the flimsiest kind. That "seizure" did not in fact affect in any way the ownership or control of the railroads or their properties, including the ownership or control of the western embankment at Vanport. No duty on the part of the United States to maintain the western embankment for flood protection purposes, or at all, arose out of this so-

called "seizure." Moreover, no act or omission of any employee of the railroads has been proved which constituted negligence. The officers and employees of the railroads, whether under federal control or not, acted in the light of all available knowledge as to the construction of the fill, the materials used and the nature of the underlying ground. As operators of railroads they acted with respect to the safety of their passengers and freight under a duty almost absolute. Yet trains passed over this fill at the regularly established intervals all during the flood period and up until half an hour before the break occurred. The United States did not build, maintain or operate the western embankment and had no responsibility therefor. Inspections of the embankment were made with meticulous care. Precautions were taken. All the indicia of disaster now pointed up by the event were appraised at the time by the railroads' representatives in the light of their duty to their own passengers and freight and of their knowledge of the nature of the fill. The event proved them wrong but not negligent.

10. On May 30, 1948, the Federal Public Housing Authority, an agency of the United States, had by written document turned over management of Vanport to the Housing Authority of Portland, an instrumentality of the Oregon State government created under the authority of an Oregon statute. The Housing Authority managed Vanport in the interest of the Federal Public Housing Administration which issued directives and had control of policies relating to the renting, financial management and supposed

welfare of the inhabitants. The Housing Authority was a federal agency and with respect to the management of Vanport it was acting as an agency of the United States.

11. No negligence on the part of the Housing Authority or its agents or employees has been proved. They carefully inspected the embankments surrounding Vanport and took care of weaknesses which developed or assisted others therein. They established patrols of the embankments and kept watch of the height of the water on all sides. Efficient arrangements were made, moreover, for the evacuation of all persons in the case of necessity. The proof of the care used in this regard is that Vanport was evacuated unexpectedly in a period of about an hour of some 16,000 people with small loss of life.

12. The United States as owner of Vanport and as landlord of the residents of Vanport, had no control over the premises leased to the Vanport tenants and no duty to protect the tenants from fire, floods or other public calamities. There is no proof that the United States as landlord and owner of Vanport failed to perform any duty owing from it to the Vanport tenants. No agent or employee of the United States has been proved to have been negligent in anything which was done or which was not done in connection with the flood situation.

13. The agents and employees of the United States and of the Housing Authority assumed no duty in connection with the flood situation which they failed

to discharge. The bulletin distributed to the residents of Vanport on Sunday morning, May 30, 1948, did not guarantee that Vanport would not be flooded. On the contrary, the bulletin, by describing plans for the evacuation of Vanport, made it clear that flood was a possibility. It was emphatic in saying that if a flood came there would be no opportunity to remove property situated in Vanport unless one happened to be on the spot at the time and then that only a few valuable possessions and a change of clothing could be saved. There was no holding out or assumption of duty to give the Vanport tenants ample time to evacuate their property. No negligence has been proved in connection with the bulletin or the statements made in it.

The United States, its officers, agencies, and employees as landlord of plaintiffs and as owner of Vanport all acted with due and ordinary care in all things connected with the flooding and damage of property of plaintiffs. No such act or omission in said capacity was the cause of the flooding of the property of plaintiff.

14. The United States had no control over or responsibility for the flood waters of the Columbia River or for the western embankment at Vanport and obviously the United States did not impound the flood waters upon its property for its own use and thereafter fail to restrain their propensity for damage. The United States did not impel the water which damaged plaintiffs' property.

15. Responsibility for the safety of property at Vanport during the flood period rested with the individual owners of the property and not with the United States. Each plaintiff was in a position to obtain full information concerning the height of the flood waters in the Columbia River and it is a matter of common knowledge that floods sometimes overtop and break down protective works and dikes. Under the circumstances each plaintiff had the option of moving his property or gambling upon the coming events. Plaintiffs failed to make a proper choice but that does not create a ground for liability against the United States.

16. The 1948 Columbia River flood was an act of God for which the United States has no responsibility.

17. Plaintiffs have failed to prove any negligence or wrongful act or omission by any employee of the United States or that plaintiffs suffered damage on that account.

18. Plaintiffs have failed to prove facts sufficient to justify a judgment against the United States on the theories upon which they rely, that is, theories of absolute liability, trespass, negligence, res ipsa loquitur and assumption of duty, or at all.

19. The contentions of plaintiffs as set out in the pre-trial order that the United States had or assumed a duty to protect plaintiffs' property, that the United States, its agents or employees, were guilty of negligence or wrongful conduct in the particulars there set forth, or at all, that the western embankment at Vanport was a nuisance, that the Corps of Engi-

neers had or failed to discharge any obligation arising out of Regulations 208, that the doctrine of res ipsa loquitur applies to these cases, or that the plaintiffs relied for the safety of their property on assurances by the United States or its agents or employees have not been proved.

20. The United States has proved facts sufficient to establish its defenses, that is, that it had no duty to protect plaintiffs' property, that there is no evidence of negligence or of any wrongful act or omission on the part of any agent or employee of the United States, that the agents and employees of the United States during the flood period were acting in a period of public emergency and exercising their discretion in that connection, and that no agent or employee of the United States assumed any duty in connection with plaintiffs' property which was not discharged.

## CONCLUSIONS OF LAW

1. The Court by this reference adopts the conclusions of law set forth in the opinion of the court heretofore filed herein.

2. The jurisdiction of this Court is invoked under the provisions of the Federal Tort Claims Act.

3. The legal rights and duties of the parties to these actions depend upon the Federal Tort Claims Act and the law of Oregon.

4. Under the law of Oregon there are three requisites for recovery of damages: (a) a duty incumbent upon the defendant, (b) a breach of that duty by

the defendant, and (c) injury and damage resulting proximately from the breach of duty.

5. Neither the United States nor any of its agents or employees owed a legal duty to protect plaintiffs' property under the circumstances of these cases.

6. No negligence has been proved in connection with the construction, maintenance or operation of the western embankment at Vanport, the embankment which failed under pressure of Columbia River flood waters on May 30, 1948. Moreover, the western embankment was constructed, owned and operated by the railroad companies and not by the United States.

7. The United States had no duty to plaintiffs in regard to flooding or damage to property of plaintiffs thereby. No act or omission of the United States and of its agencies, officers or employees had causal connection with regards to flooding or damage to property of plaintiffs thereby. Neither the United States nor any of its agents, officers, or employees assumed any duty or liability to plaintiffs in regard to flooding or damage of the property of plaintiffs thereby. The United States had no duty to plaintiffs on account of the construction, ownership, maintenance or operation of the western embankment or on account of the May 1948 flood of the Columbia River.

8. Neither the United States nor any of its agents or employees assumed any legal duty which was not fully discharged.

9. Neither the United States nor any of its agents or employees has been proved to be guilty of any

negligence or wrongful conduct within the meaning of the Federal Tort Claims Act.

10. Under the law of Oregon there is no liability without fault under the circumstances of these cases.

11. Under the law of Oregon there is no liability for trespass under the circumstances of these cases.

12. Under the law of Oregon the rule of res ipsa loquitur is not applicable to these cases and in any event there is evidence in the record adequate to rebut any presumption of negligence which might arise out of that rule.

13. Under the law of Oregon no person has responsibility for a natural stream flowing in its bed whether in flood or not.

14. Under the law of Oregon a person who erects a dike or embankment for flood protection or other purposes has no duty under the circumstances of these cases to maintain that dike or embankment carefully or at all for the benefit of those who own or occupy property in a location which it appears to protect.

15. Under the law of Oregon a landlord has no duty to protect his tenants against fire, floods or other public calamities.

16. Under the law of Oregon each plaintiff was responsible for the safety of his property at Vanport during the flood period and each plaintiff, by failing to remove his property from Vanport, took the risk that it might be damaged by flood waters.

17. The so-called seizure by the United States of the properties of the Spokane, Portland and Seattle Railway Company and the Union Pacific Railroad Company during May and June, 1948, was a mere formality which did not affect the ownership or control of the western embankment at Vanport and which did not impose any duty upon the United States in favor of plaintiffs.

18. There was no breach of any duty owing from the United States as owner of Vanport to these plaintiffs.

19. The provision of 33 U.S.C.A. 702(c) that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River; and it was not repealed by the Federal Tort Claims Act.

20. The United States is entitled to judgment.

21. Each party shall bear his or its own costs of suit.

These findings of fact and conclusions of law are in accordance with the pre-trial order, the record made on the trial of the actions and the opinion of the Court heretofore filed in these consolidated cases.

Dated this 29th day of January, 1953.

James Alger Fee,
United States District Court Judge

No. 13,866

# United States
# COURT OF APPEALS
## for the Ninth Circuit

SOLON B. CLARK, JR. and GERALDINE A. CLARK, husband and wife, and RELATED CASES,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

## REPLY BRIEF FOR THE APPELLANTS

*On Appeal from the United States District Court for the District of Oregon.*

GERALD J. MEINDL,
American Bank Building,
Portland, Oregon,
SOLON B. CLARK,
A. C. ALLEN and
SAMUEL B. LAWRENCE,
Swetland Building,
Portland, Oregon,
IRVING RAND,
Public Service Building,
Portland, Oregon,
RAY G. BROWN,
Henry Building,
Portland, Oregon,
*Attorneys for Appellants.*



STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1–54

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No. 13,866

# United States
# COURT OF APPEALS
## for the Ninth Circuit

SOLON B. CLARK, JR. and GERALDINE A. CLARK, husband and wife, and RELATED CASES,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

## REPLY BRIEF FOR THE APPELLANTS

*On Appeal from the United States District Court for the District of Oregon.*

## REPLY TO CLAIM OF NON-LIABILITY BECAUSE OF GOVERNMENT OWNERSHIP OF VANPORT

The government before the trial court and again in effect in this Court put forth an argument entitled "No action can be maintained against the United States on account of Government ownership of Vanport." The gist of this extensive and somewhat distorted argument seems to be that the fact that the government was a

landlord and owner of the premises should make no difference in the ultimate result of the case.

The matter is approached from various angles, but the solid and immovable fact of the relationship between the government and the plaintiffs has confronted and confounded the government no matter what angle of approach is taken. The government said (Trial Brief) that the relation between plaintiff and the United States was in fact that of sub-tenant and owner, not tenant and landlord but, "that *it makes no difference.*" In our opening brief we demonstrated that the government could not shield itself from liability by the interposition of the agency known generally in the record as HAP, and we take it that the government then, and by the statement just referred to, so admitted. We see little, if any, difference as respects tort liability between the liability to a tenant and the liability to a subtenant. There is the inherent and inescapable relationship between the parties. This solid and immovable fact of this relationship may be scoffed at, but it cannot be escaped.

In the argument under this heading, the frst contention of the government is that it cannot be charged with negligence in the selection of the Vanport site. A simple example in a comparable situation will demonstrate the inapplicability of this contention. In an automobile collision case the parties do not accuse each other of negligence in the original purchase of their respective cars, this being too remote, but make charges of negligence in respect to such items as lookout, speed and control, under the circumstances existing at the

time of the accident. So here the selection of the site a number of years previously, while admittedly foolhardy in the light of after events, is too remote to be of more than passing interest, and to so demonstrate does not improve the legal position of the government.

The second contention of the government under this heading is to the effect that the responsibility of the government to the plaintiffs and their property existed only insofar as the apartments rented to the plaintiffs were concerned, and that the western embankment that failed had not been leased to the plaintiffs and they were not expected to use it, and hence its failure in the swirl of waters may be forgiven and forgotten. We believe that this type of argument will not impress the Court. We think that this matter must be seen as a whole, and that discussion of isolated segments of one entire situation yields no fruit. The government tries to cut the cow in two and keep only the hind part to get the milk, while avoiding the front part that requires grain and hay.

The third contention of the government under this heading is generally to the effect that a landlord is under no obligation to his tenants, except in unusual circumstances not here existing, and may stand by and see his tenants drown, or be killed by falling buildings, or burned to death in fire traps rented to them by the landlord, or otherwise injured or killed, with absolute impunity. We cannot believe this to be good law, and neither do we believe that any case cited by the government sustains any such contention. In our opening brief we have given the Court our observations upon the

Oregon cases, and we need not repeat these observations here. The government cites two Oregon cases, the *Stovall* case in 158 Or. 206, and the *Asheim* case in 170 Or. 330. In the *Stovall* case plaintiff's hand was injured by the breaking of a porcelain handle to the water faucet in the bath tub while plaintiff was turning the handle. She brought action for breach of warranty, and not upon negligence. The Supreme Court, "Having reached the conclusion that no warranty was made by defendant (decided that) it is unnecessary to consider whether, in the event it had been made, plaintiff would be entitled, in an action of this kind, to recover damages for personal injuries."

In the *Asheim* case (170 Or. 330) the Supreme Court simply upheld a judgment of the trial court in favor of a landlord in a personal injury action brought by a tenant where the tenant had exclusive possession and control of the entire leased premises and the landlord had done nothing to cause the injuries. The opinion makes it abundantly clear that when the landlord leased the premises to the tenant there was no apparent need for any repairs, that the tenant had exclusive control and possession of the premises and the landlord had no control thereover, and that no notice or warning was given by the tenant that repairs were required. The plaintiff contended that there was sufficient evidence of negligence to require the submission of the case to the jury, and that "the doctrine of res ipsa loquitur applies in cases in which the landlord has exclusive control of the premises," and the Court says, "With this contention we agree. The difficulty in the application of this

rule to the facts in the present case is that here the landlord had no exclusive control over the leased premises, nor, for that matter, any control whatever." The Court unequivocally stated its willingness to apply the res ipsa rule in landlord-tenant cases where injury occurs through defect in the premises under the control of the landlord. This case consequently sustains the contention of the plaintiffs, rather than that of the government.

It has not been the contention of the plaintiffs that the government was an insurer of the safety, either of their persons or their chattels, but it has consistently been the contention of plaintiffs that the government, being the owner of what we might describe as the Vanport bowl and in control thereof and collecting rentals, could not be negligent with the lives and property of its tenants and gamble their safety with impunity. Res ipsa loquitur applies. Buildings do not wash away in the ordinary course of affairs. A better explanation under the Tort Claims Act, than that the government is not an insurer, is necessary and has not been forthcoming.

As a fourth subdivision under the above heading, the government (after having previously denied liability on any grounds) admits that a landlord, having knowledge, has the duty to warn his tenants. Then the argument is made that the government did not have actual notice of a defect in the western embankment. But the fact remains that under all of the circumstances the government should have known of the defects and would have known had due care been exercised by its agents, and at least the government should not have gambled the safety of 18,000 people and their goods, against a few

dollars rental money, on an unknown element, and should not have negligently given assurances of safety when the unknown predominated the scene.

The fifth subdivision of the argument of the government is very short and twice as difficult to understand. The theme seems to be that the government, as landlord "assumed no duty to plaintiffs." But as we understand the Tort Claims Act, the law imposes a duty in the specified instances, and this duty so imposed is the basis of the action, not a contractual assumption of duty by the government.

In another contention resort is had to the method of arguing, which we have characterized as cutting the cow in two. It is said that the government was not careless as landlord because plaintiffs did not use or occupy the western embankment (which disintegrated) in common with other tenants, or at all. Cases are cited to the effect that portions of leased premises used in common by tenants and landlord are the responsibility of the landlord and he has a duty to maintain them and to exercise due care, but it is said that the western embankment is no portion of the leased premises. But just as there was only one cow, rather than unrelated legs, horns and other parts, so there was only one Vanport and one essential to its existence, the facilities of the government keeping it from being drowned.

The government seeks to excuse the carelessness of its employees as "highly discretionary activity" and activity during "an emergency period." Just what is an emergency period and just what is a flood fight are

two "Words and Phrases" floating willy-nilly through the government's brief. But we are not concerned in this action with the period of emergency when the Vanport houses were sloshing about in the flood waters, nor with the fight made by a lot of determined people in trying to pull victims out of the water or to salvage what property might be saved. We are concerned with the period prior to that time. The gravamen of the action is the negligence of the government in not doing the obvious, when for days the cresting flood had become a certainty, namely informing the tenants of the probable danger and assisting them in evacuating, and in doing the reverse, namely in negligently assuring the tenants of their safety.

## REPLY TO CLAIM OF NON-LIABILITY ON THE FACTS

In cases where there is a large amount of testimony, usually a sharp conflict arises between the parties as to what the evidence does or does not prove. Both the trial judge and the government are in error in picking out certain portions of the case to sustain their views. As we have said before, this case must be considered as a whole. It is not necessary to go into any lengthy discussion of the evidence to demonstrate that the trial judge, as well as the government, are both clearly in error. The cold facts, not conclusions, sustain our position

Both the Army Engineers and HAP were highly negligent until the very moment the railroad fill broke.

It was a series of negligent acts and omissions which combined to cause the catastrophy.

From whatever angle the government approaches this problem, it is confronted and confounded by the immovable fact that the government owned Vanport, with the apartment houses, in fee simple, and the plaintiffs were its tenants; and, that these tenants were in greater jeopardy from the high water than they or anyone else at that location had ever been before. The climax of this is in the fact that railroad fill, to which very little attention was given, broke and flooded out the plaintiffs after they had been assured that they were safe.

General Walsh at the time of the flood was the U. S. District Engineer in general charge of the area. His testimony should be given overwhelming weight. It proves the plaintiffs' contentions clearly and convincingly. The plaintiffs were compelled to call General Walsh as witness, because of his position with the government, and the government must be bound by his testimony.

General Walsh testified as follows:

"Q. General, if you were asked to give an opinion on the strength or integrity of any particular structure to withstand the pressure of water, what are the essential facts you feel you would need to know about the structure before giving an opinion?

A. I would want to have as much information as I could get as to its cross-sectional, its height, the materials with which it has been constructed, and in general the conditions of its foundation." (Tr. 331)

"Q. General, in the flood period of May, 1948, up to and including May, 1948, did you personally

know how the railroad fill was constructed or have any knowledge of the materials composing the fill that failed?

A. I did not.

Q. Did anyone in your office in the City of Portland—that is, the Office of the District Engineer—have such knowledge, if you know?

A. I found no one that had any knowledge concerning material in fill prior to the 30th of May, 1948." (Tr. 335)

Also Mr. Dibblee, one of the U. S. Army Field Engineers in charge at Vanport, testified as follows:

"Q. I believe, Mr. Dibblee, you testified on direct examination that you knew nothing of the material of which the railroad embankment was made; is that correct?

A. Nothing other than what you could see from an outside inspection of the slopes." (Tr. 947)

"Q. Mr. Dibblee, would it have been helpful to you in giving advice at Vanport prior to May 30th, 1948, if a soil investigation had been made of the levee portions and foundations of the railroad embankment prior to that time?

A. Yes, it would have been helpful.

Q. If such a soil investigation had been made and you had been advised as to the findings, isn't it possible that your advice might have been different at Vanport, Mr. Dibblee?" (Tr. 952)

"A. Oh, it probably would have depended entirely on the result of the investigation.

Q. As I understand it, then, Mr. Dibblee, you would have to know what that soil survey showed to give an opinion; is that it?

A. Had there been a soil survey and the results from it available, and the results indicated that the conditions in the levee were very, very poor, certainly it would affect my actions out there about advice in regard to that levee. But had the study been the other way around it would maybe have strengthened my advice." (Tr. 953)

After the flood this same Mr. Dibblee made written recommendations as to what should be done in reference to the railroad fill, to protect the Vanport area from future floods, as follows:

> "Soil investigation of earth portions and foundations of the Union Pacific Railroad embankment, S. P. & S. Railroad embankment, and Denver Avenue, to definitely determine the type, depth and extent, and to use such information as the basis of a study to determine the necessity of constructing cutoff trenches and core walls therein or construction of entirely new levees and abandonment of the former embankments." (Tr. 956)

These words taken from the lips of the Army Engineers in charge, and in this action charged with negligence, cannot be controverted or impeached by all the hypothetical answers of all the experts in this case. If General Walsh wanted or needed to have the information concerning the composition of the railroad fill—and it would have been helpful to Dibblee to know it—the defendant was not using that degree of care required with the safety of eighteen thousand (18,000) people at stake, and the Engineers of the defendant were certainly not justified in assuring the defendant's tenants that the fills were safe. If an investigation should be made now, according to Mr. Dibblee, why wasn't it made in 1934, when Congress authorized the Engineers to make the area safe? Why wasn't it done when the government purchased Vanport, and built a housing project thereon, and brought thousands of people there to live? Why wasn't it done before these thousands of people were assured that the dikes and surrounding structures were

safe, and before the plaintiffs were given these assurances of safety.

Discretion as a matter of law and common sense must arise and be activated by a knowledge of the facts. If you know not the facts, discretion cannot be exercised. Here there existed no knowledge of the actual facts so there can be no allowable discretion. This is not a case of high-level cabinet discretion or otherwise. The U. S. Engineers admit that they should have known the composition of the railroad fill, before they gave advice concerning the fill. It was the defendant's obligation to know the facts before acting. (Maryland Manors Case)

Had the defendant's Engineers made such an investigation, the defendant would have found the fill to have been made of sand, with a mud bottom (Tr. 549).

Furthermore, the defendant would have found the fill full of rotten timbers (Tr. 384, 4 photographs Ex. No. 318).

The government claims that the voids in the rotten timbers would have been filled in by the sand from the fill with all the trains running over it. In the admitted statement of facts in the pre-trial order, on page 17, the following appears:

> "Subject to such contentions as may hereinafter be made with respect to the high water of May, 1948, the fill has never subsided, caved or sloughed off . . ."

So, therefore, the voids created by the rotten timbers were not filled, as otherwise the fill would have subsided or cracked or sloughed.

Such an investigation (and this is one of our main theories as to the cause of the failure) would have found the fill sitting on 12 feet of soft mud (Tr. 549, Suttle), and the fill failed for lack of foundation. The government claims that the fill would have pushed out the soft mud by its own weight, but it had not done this, because if it had the fill would have subsided some 12 feet, and it had not subsided at all. All of the opinions of all the experts cannot change the actual facts nor distort the photographs entered as exhibits.

Dr. Mockmore, the head of the Department of Civil Engineering at Oregon State College since 1934 (Tr. 679), explains clearly and in detail each one of these conditions which made the fill dangerous. Practically all of the expert testimony of the government disagreeing with Dr. Mockmore was based upon the assumption that the voids in the rotten timbers had been filled and the soft bottom forced out, a hypothesis which was entirely wrong, because the fill had not subsided and the material could not have come from any other source.

The next disputed question of fact concerns the activities of the agents and employees of the government, immediately prior to May 30, 1948. In this regard, we again call upon General Walsh and his field engineers to give us the evidence, which evidence is also undisputed. We call the Court's attention to the fact that in the Dalehite case the inspections were ordered at higher level or cabinet level and were followed through in accordance with orders therefrom. Here we have the exact opposite.

We quote from the testimony given by General Walsh:

> "Q. In maintaining under proper practice a drainage district are periodic inspections essential immediately before high water periods are expected?
>
> A. In the regulations which the Secretary of the Army has prescribed for drainage districts that have received assistance in their construction by the Federal Government that is a requirement.
>
> Q. Now, in making those inspections, General, what are some of the things the inspector should look for, if you recall?
>
> A. They should look to see that the levee is sound from all external appearances; that it has not been burrowed into by muskrats or other burrowing animals; that the levee is not rutted so that it would tend to collect any rainfall and become saturated; that the brush, trees and what not, that tend to grow on levees have been reasonably well cleared off so that you have ready access to all parts of the levee and the areas behind it." (Tr. 332)

Very particular attention is called to the failure to remove the brush and trees, which were growing at the exact spot where the fill broke. Mr. Kinser, who was in charge of the tower at the exact spot where the fill broke, testified as follows:

> "Q. At any time before the railroad fill failed, Mr. Kinser, did you see any seepage down the slope of the fill?
>
> A. No. At that particular time there was a dense line of cottonwood trees on the Vanport side. You couldn't see down below for the foliage on the trees.
>
> Q. But you could see down the slope of the fill, couldn't you?
>
> A. Well, not at that time. There was grass and briars, and everything else down there." (Tr. 394)

Mr. Maderis had been in charge of the pumps that pumped the water out of Vanport from a ditch that came down along the toe of the railroad fill and had worked in that capacity for several years. He testified as follows:

"Q. Did you notice whether that, there was any seepage along there?

A. Yes, I did.

Q. And for what distance would you say?

A. Well, there was

Q. Above now

A. There was seepage from the pump station clear up, clear up to the end of where the apartment buildings were." (Deposition p. 8, Ex. 199)

On page 9 of Maderis's deposition, Ex. 199, he testified that he had been pumping muddy, soupy water for ten days prior to the break, and (p. 11) that he had never seen any muddy water in the ditch before.

"Q. What had been your experience as to when you see muddy water, does that suggest anything to you?

A. Well, yes it suggests that it is cutting somewhere. Seepage water is clear and when you get muddy water, it is cutting through the dirt somewhere.

Q. Now, Mr. Maderis, was there anyplace along there that there could have been any cutting through this dike, excepting through the railroad fill?

A. No place that I could tell, it would have to come from the railroad fill." (p. 16, Ex. 199)

Maderis reported this condition to officials or employees in charge of the activities of HAP, was told that such talk would create a panic and nothing was done about it. The big point is this, that if the brush and

trees had been removed from the fill this muddy water would have been observed by others and steps would have been taken to stop the leak or get the people out, and the same thing would have occurred if the responsible people of HAP had paid any attention whatever to what Maderis told them.

So far as care is concerned:

We challenge the trial judge's findings and the defendant's conclusions that the railroad fill, which failed, ever was patrolled either by competent or by incompetent persons. It was not supposed to be patrolled, according to the testimony. The defendant's witnesses testified in general to the patrolling of dikes protecting Vanport. But, the plaintiffs are interested in what precautions were taken concerning the railroad fill, which broke, according to the evidence. Very little attention was ever paid to the railroad fill for the obvious reason that the engineers advised that it was not "necessary" as above mentioned (Tr. 563). Mr. Taylor, the man in charge of the patrols of HAP, testified:

> "Q. As of Sunday, May 30th, Sunday morning, about how frequent was the patrol, as you remember?
>
> A. We had discussed that it should be necessary to have them cover the entire wet portions of the dike just every five minutes. And just prior to the break we had made arrangements for increasing that to where they would have, if I remember right, about 200 feet per person, and that could have been covered a little more often than that.
>
> Q. Do you remember what sort of patrol was established for the western embankment?
>
> A. Along the south end of the railroad fill, or western embankment, we had two patrolmen cover-

ing that portion that would have been affected by the water, which was that portion bordering Triangle Lake. We had one man—there was quite a bit of brush right along the side of the railroad bank, and we had decided that we would put two or three patrolling that area. We wanted a patrolman above the brush line and one below it." (Tr. 573)

In other words, there wasn't anybody patrolling the most dangerous part (the part that failed) of the whole system; it will be noted that Mr. Taylor testified to what they had planned to do in the future. Supporting the above statement is the testimony of two railroad men, Mr. Saling, the Roadmaster of the U. P., and Mr. Rickard, the Trainmaster of the U. P. They went out on the railroad fill that failed on the morning of the 30th, about 9:30 a.m. Mr. Rickard testified as follows:

"Q. Mr. Rickard, did you see anybody working at these boils you have described?

A. There was no one working when we arrived there; no, sir.

Q. You were around there about an hour?

A. Just about an hour; yes, sir.

Q. Was anybody working on them when you left?

A. No, sir.

Q. They were unattended all the time you were there?

A. Yes, sir." (Tr. 877-878)

Mr. Saling testified (and bear in mind this was with reference to Sunday morning, the day the fill broke):

"Q. Now, you remember on that Sunday morning seeing this boil about 150 yards north of the tower. You would place that definitely at about 150 yards north of the interlocking tower?

A. Yes, it would be approximately, because it is quite some distance. There was some large Cottonwood trees right close.

Q. When you observed this there was no one working there, was there?

A. There was no one there.

Q. Nobody with any sandbags?

A. No.

Q. And there had been no activity there, had there?

A. No.

Q. There was none up to the time you left, was there?

A. No, there wasnt." (Tr. 873)

If the plans Taylor testified to had been in effect, these two railroad men would not have failed to see some of these so-called "five-minute patrolmen" during the time they were there.

The defendant's brief contains so many erroneous statements of the facts that it is, as a practical matter, impossible to cover them all in this brief. However, here is one of the most important and one of the most insubstantial, which we wish to call to the Court's attention. On page 43 of the Government's Brief appears this statement.

> "It is suggested that absent the bulletin and the newspaper comment, the Vanport plaintiffs or some of them would have left the project (Br. p. 41). The record contains no support for this suggestion. No one of the plaintiffs so testified. Not one of them claimed that at any time he made plans to leave or to remove his property . . ." (Govt. Br. p. 43)

The person who drew the defendant's brief apparently did not read the record.

Mr. Clark, the original plaintiff in this case, testified:

"Q. Did you consider the matter and make any moving plans?

A. Well, I had anticipated moving, and Friday night I had reserved a truck to be used Saturday morning to move out.

Q. Just what did you do? You say you reserved a truck?

A. Well, I contacted Covey's U-Drive and was told I could have a truck for approximately two hours Saturday morning.

Q. Did you make such arrangements?

A. Yes.

Q. Then what happened?

A. Then Friday night the newspapers and the radio, and everything, still indicated that there was no trouble, so I changed my mind and didn't take the truck." (Tr. 30-31)

Again on pages 41 and 43 of defendant's brief we find the following:

"Nor were these so-called assurances of safety assurances from the United States or its employees. . . . As might be expected, that information was obtained from family and friends, from the bulletin and from the newspapers and radio."

Mr. Pendell, one of the plaintiffs testified:

"A Well, there had been so much rumors around there that I told my wife I was going to call up and find out what was going on. So I called the office. They had their own switchboard, and I asked for Mr. Jaeger. And they said, 'Well, we will see if he is in the office.' They called back and he answered the phone. So I asked him since so many people were moving out of there what was the situation as to the flood. He said, 'The Engineers have assured us that there is no immediate danger. Everyone will be notified in plenty of time, and anyone

that moves out is not going to get back in.' " (Tr. 368)

Mr. Taylor was Assistant General Manager of Vanport; he testified as follows (Tr. 563):

"Q. Before you tell us that will you fix the date and the time and place?

A. I am not sure that I can tell whether it was Friday or Saturday. It was about that time during the week, and I believe early in the morning.

Q. All right. Go ahead.

A. And on that occasion we inspected the north levee and the south levee, and prior to leaving the south levee I asked Mr. Doyle if he thought that we should inspect the railroad fill, and he said something to the effect that that was—he didn't think it was necessary. I am sure he had in mind that we were patrolling it, or for that reason—I think he also made the statement that the railroad fill was so constructed; that is, it had a considerably wider base and was higher than the other levees—was adequately high, or something like that, and that it just wasn't necessary, he didn't think, to go over it at that time.

Mr. Taylor testified further on pages 583 and 584:

"Q. Did anyone suggest to you that Vanport was in danger?

A. No, not that I can recall.

Q. Had you received any information, Mr. Taylor, prior to the failure of the western embankment, to indicate to you that Vanport might be flooded?

A. Well, I thought in my own mind that there was always a danger that it would be, because the water was above the ground level inside the project.

Q. But, aside from the general circumstances, did you receive any specific information?

A. No.

THE COURT: If nobody told you Vanport was

in danger, what was this seriousness of the situation that was discussed at the meeting?

A. Well, the fact that I myself knew that should the dike break, or water should get into the project in any way, that the water level would be above the first floor level of all the houses. I couldn't help but think that it was a serious affair. I believe that I was more thoroughly convinced that it was serious after my discussion with the Army Engineers, because of the fact that they specifically quizzed me about what preparations we had made, and that we were instructed what things had to be done to stop the seepage if it were to get started.

THE COURT: Nobody had told you that Vanport was in danger, with 30 feet of water around it, did they?

A. No."

The defendent, on page 27 of its brief, states: "There is no evidence that anyone knew or could have known that Vanport was in danger." We dispute this statement. If Vanport was not in danger and the officials and employees, herein charged with negligence, did not know Vanport was in danger, we ask, why all the activity on their part, as disclosed by this record. If the defendant, its agents and employees, had taken the ordinary reasonable care required in this case, they would have known Vanport was in danger.

Furthermore, the evidence shows the defendant, its agents and employees should have reasonably known that the residents were in danger. We again quote from the testimony of General Walsh.

"Q. In times of flood do certain danger signs of weakness manifest themselves on a structure generally?

A. Yes.

Q. What are those essential symptoms or danger signs?

A. The principal manifestations of possible danger in a levee are the delevopment of seepage, sand boils, blisters on the inside face of the levee and in the soil inside of the levee; also the development of cracks in the levee structure itself, either longitudinal or transverse; and possible sloughing or subsidence of a portion of the levee." (Tr. 331-332)

These are actual danger signs identified by General Walsh, Engineer in charge in this case, and cannot now be disputed. We most earnestly call the attention of the Court to the fact that the pre-trial order states as an agreed fact in the case that the railroad fill had never before subsided and nothing but normal maintenance was ever before necessary. The very fact that it had withstood the action of the elements over all these previous years, and then suddenly developed every sign of danger detailed by General Walsh, should of itself have been notice to the Engineers and employees of HAP in charge that Vanport was in immediate danger. The evidence conclusively demonstrates that all danger signs enumerated by General Walsh existed.

The fill was seeping and running muddy water for ten days before the break.

The "Levee structure itself" had cracked.

Mr. Kinser, in charge of the control tower situated in the railroad fill at the very spot where the fill failed, testified:

"Q. Do you have any way of knowing what caused the settling and the sagging of the railroad tracks?

A. Yes. Well, of course I am not an engineer, but as far as I could figure, why, the foundation of the fill was being saturated and softened until it would cause an irregularity on the alignment of the tracks.

Q. What, if any, other unusual conditions did you notice about the railroad embankment near the interlocking tower in those days?

A. Well, right back of the control tower the fill started to sag, and a crack about 60 or 61 feet long started to form about three days before the flood. And it gradually got wider and wider, and I reported that to the office, both the U.P. and the S.P.&S., and they sent their engineers and trackmen down there, and they inspected it, and I ran trains over it for two days more. And on the day of the flood it started in to widen about four or five inches, so I called up the Union Pacific and told them not to send any more trains up until they sent their civil engineers and trackmen out there to inspect it. And they didn't" (Tr. 383).

The defendant attempts to place the blame upon the railroad company, even though the defendant claims to have had competent inspectors all over the place. Mr. Stanton, Vice President and General Manager of the S.P.&S. Railroad at the time, testified that the Army Engineers either knew or should have known of the dangerous condition of the fill. His testimony also disproves the claim of defendant's engineers, that the Engineers undertook no responsibility for the fill.

"Q. As the flood progressed did you become concerned about any particular matter out there?

A. Well, as the flood progressed we certainly became concerned about it.

Q. What if anything did you do in the way of calling the Engineers?

A. We called the Army Engineers.

Q. Can you fix the date of that telephone conversation?

A. Well, no; not right now.

Q. It was sometime prior to the failure of the fill?

A. Oh, yes.

Q. Tell us what happened. What did you have in the way of conversation?

A. Well, we became concerned with the fill out there and various parts of the railroad, and I called the Army Engineers to see what they were going to do, if they needed some help. We had men out there at the time. And they informed me that they were watching it, watching all the fills around there.

Q. What else, if anything, did they tell you?

A. They said they had inspectors out there and they were watching it.

Q. Did they tell you whether or not you need be concerned?

A. Well, they intimated that I didn't need to be very much concerned; that they were watching it" (Tr. 63-64).

General Walsh testified that "subsidence" was a danger sign. The fill had never before subsided, and it did subside before it broke to such an extent that the railroad company put a "slow order" on the trains. In the face of this slow order by the railroad company, then under the control of the the United States, the defendant still claims there were no signs of danger. Mr. Westergaard, the General Roadmaster of the S.P.&S., testified:

"Q. What did Mr. Cunningham report to you, Mr. Westergaard?

A. He stated then that this same spot that he had told me about Friday had gone down again.

Q. Did he tell you how much?

A. He said about the same as before, and largely it affected just the same track of the double track, the northbound main.

Q. Did you give any instructions to Mr. Cunningham in that connection?

A. I told him exactly the same as I told him before. I asked him if he thought a slow order was necessary, and he felt it would be safer from what he saw of things out there, so we placed a slow order on" (Tr. 840).

Not only should the defendant, its agents and employees have known Vanport was in great danger, but the record clearly shows they did know Vanport was in danger. May Decoy, an office worker for HAP, testified as follows:

"Q. Are you acquainted with Mr. John Boyd?

A. Yes, John Boyd was employed by the Housing Authority.

Q. What was his position with the Housing Authority?

A. He was Head of the Furniture Department.

Q. Did you have occasion to see John Boyd late in the afternoon of Friday. That would be May 28, 1948?

A. Yes, after I had written up my records and reports for the furniture repair, I took them down to the maintenance department, the office in which Johnny Boyd works: They usually go home at 4:30 and I thought it strange they were still working. There were several men there, and they were carrying out boxes and files, that contained the Housing Authority records, the records of the furniture and the credit union cards, and so on, and I turned to Mr. Boyd and said, 'Seeing you move the records out makes me feel like going home and pack,' and he said, 'Oh, don't worry, May, we are just taking out things that just can't be replaced' " (Ex. 172, p. 8).

Why were these plaintiffs told they were safe when the defendant was moving its own records out two days before the disaster?

May Decoy testified further:

> "Q. What if anything did you do on the evening of Friday, May 28, 1948?
>
> A. We drove around the project. When I say around the project I mean up the road as far as we could go, and went up the road as far as Swift Road, and they were repacking a manhole there that had sprung a gusher, and they were trying to repack it with straw, and I saw one of the Housing employees there at the time, and I talked to him about the flood, and he told us that the situation was worse, that the water was rising, and why didn't we go home and pack and get out" (Ex. 172, p. 9).

What does the defendant mean when it says nobody believed Vanport was in any danger?

Mr. McGill and Mr. Taylor, HAP employees, were both holding important positions in directing the flood. May Decoy testified as to the conversation between the two before the flood.

> "Q. All right, now go on with the conversation about the pump.
>
> A. They told Mr. Milliron to repair the pump, and he said pumps couldn't—electric pumps couldn't work under water, and they told him to raise is up and get it out of the water, and then they talked about how high the water was in the other parts, and about how many sand bags they were going to have to have, and how many they had already used to stop some of the gushers that were coming through, and then Mr. McGill got up and walked the floor and talked in a very loud voice and he said: 'It's bad Roy.' And he talked about what they would do in regard to evacuating the people, and always Mr. Taylor would say, 'Well, that isn't necessary' " (Ex. 172, p. 13).

Clearly this testimony proves the defendant's agents and employees demonstrated that they knew Vanport was in danger and also shows the disregard they had for the safety of the Vanport people, the defendant's tenants.

Mr. Ward, the Project Service Adviser for HAP, attended a meeting of the Red Cross the day before the disaster. He testified that Mr. Berentson, the head of the Red Cross, opened the discussion by asking, "WHY NOT EVACUATE THE PEOPLE OF VANPORT" (Tr. 914). If Vanport was not in danger, why did the chairman of the Red Cross propose to the representatives of HAP that the people of Vanport be evacuated? Mr. Ward furthed answered as follows:

> "Q. Did the Housing Authority, to your knowledge, prior to the issuance of this bulletin actually have any plans of evacuation reduced to writing?
>
> A. Not in writing, no.
>
> Q. Did it have any plan at all?
>
> A. One of my own personal actions prior to the close of business on Friday, with a three-day holiday coming up, was to ask all of our staff, some eleven people, to come down to the Community Building Center to help with the aged and infirm who might need help. Other than that it was felt THAT IT WOULD BE A MATTER FOR INDIVIDUAL PEOPLE TO HANDLE THEIR OWN EVACUATION" (Tr. 925).

It demonstrates so conclusively the whole plan of the responsible officials and employees to be discretionally negligent that it is truly appalling. They knew Vanport was in imminent danger, but as long as they got their own records out, they didn't care what became of the people.

All this testimony and evidence demonstrates that the responsible officials assumed they had a discretion to be negligent. They knew Vanport was in danger of being flooded, otherwise, why move records and leave some 18,000 people to the mercy of anything that grew out of this great existing danger or that might happen or befall them.

The government's contention is that it is not liable for damages caused by flood under any consideration.

In our view of the matter, when the trial judge found that the government was not responsible for flood damage in *any* case, the inescapable reasoning from there on would be to make findings of fact which, though irrelevant to that question, would sustain the final conclusion; in other words, the government contending and the trial judge finding that all of this damage was caused by a flood and that in no case could the government be liable for flood damage, what was the necessity of any further findings of fact or conclusions of law?

Now while we have contended in our initial brief that the ultimate disaster was caused by the assurances of safety, we do not recede from our fundamental position taken in the trial of this action and expressed in our Statements of Points to be Urged on pages 11 to 14, inclusive, of our original brief. We furthermore call attention to the government's statement contained on page 52 of its brief in which it states:

> "In the Court below appellants stated and argued a number of grounds of alleged negligence (Pto. 83-87d). Apparently all are now abandoned

in favor of a claim of misrepresentation and negligent advice."

We suggest that the government attorneys confine themselves to the argument of their own case instead of telling us what our position is in view of the strict compliance with the rules of this Court, as expressed on said pages 11 to 14, inclusive.

While unquestionably we have in our opening brief spent considerable amount of time on the question of "assurances of safety" (as now stretched by the government to include the word misrepresentation) we do not under any circumstances submit our entire case upon this sole question.

Unquestionably the government would like to try this case before this Court on its own interpretation of the facts and its own interpretation of the law by "piecemeal," but this case is before this Court upon the record and upon the facts (not conclusions of facts) as we have set forth in this brief.

The language in the Jones case and the Mid-Central Fish case segregated from the facts in those cases would apparently hold against us if we relied solely and only upon statements of the Army Engineers; but when we realize that these statements, or as we take it, assurances of safety, are merely the culmination of a long series of highly negligent conduct on the part of governmental officials, we respectfully submit that it is not based upon a "misrepresentation" as meant under the terms of the Tort Act.

The whole thing was born in iniquitous negligence from the year 1934, when the Army Engineers disregarded the mandate of Congress to make the area safe from flood, to the hour of 4:30 P. M. on the 30th day of May, 1948, when the fill washed out.

If we call the assurances of safety in this case "misrepresentation" under the terms of the Tort Act, then there is no recovery for anyone under the Tort Acts; the driver of a government vehicle, when in the line of duty, holds out his hand to make a right turn, makes a left turn and causes an accident can be absolved on the ground that he misrepresented the direction which his vehicle would take.

General Walsh was District Engineer of the Army Engineers of the Portland District, in which the Vanport area was situated. He testified that under orders of the Secretary of the Army it was the duty of the Army Engineers to inspect the embankment protecting the area and to see that brush, trees and so forth were removed. He also testified that before giving any assurances of safety or advice he would want to know the composition of the embankment or fill in question. He also testified that cracks, subsidence, sloughing and seepage of muddy water were signs of impending failure; he testified he did not require the brush, trees and so forth to be removed from the railroad fill and while he himself did not observe the manifest danger signs he, as commanding officer of this area, was responsible and negligent in not seeing to it that all these matter were taken care of.

## ENGINEER'S ASSURANCE OF SAFETY

Much has been said by the government in its brief about the failure of the plaintiffs to prove that they directly ferreted out the individual Army Engineers and cross-questioned them as to the condition of the safety of Vanport and that the Engineers did not see fit to make a personal call on each and all of the plaintiffs to advise them that Vanport was safe and that, therefore, none of the plaintiffs could claim reliance upon anything the Army Engineers said.

The answer to such contentions is very simple. The Army Engineers did not deny that the newspaper releases shown in the exhibits here, the radio reports and the assurances made by the Housing Authority of Portland did not originate with them, the Army Engineers.

Remembering that HAP was a governmental agency and that Mr. Jaeger was the General Manager of such agency, his statement on this is very enlightening.

> "A. Well, the meetings we had with the members of the United States Engineers during that week previous were every day. They were down there and cooperated with us fully, and we relied on them, of course, for our information concerning the dikes. We were not competent judges of diking material or things like that, and we told them that at the time, that we were relying on their judgment in so far as anything we should do to protect the dikes.
>
> Q. With what representatives of the Army Engineers were these conversations?
>
> A. With Mr. Doyle and Mr. Dibblee.
>
> Q. What, if anything, did they say to you in

response to your statement just made? I mean the statement to which you have just testified?

A. Well, their information that they gave us was that the dikes were adequate, that we had nothing to worry about, and that was our constant information from them" (Tr. p. 736).

This was never denied by any of the Army Engineers.

Both HAP and the Army Engineers being agents and/or employees of the United States under the terms of the Tort Act, it seems to make little difference in our minds as to which one actually disseminated the assurances to these plaintiffs. It is merely a question of governmental "buck-passing" in that the Army Engineers insist that HAP was responsible, and HAP insists that the Army Engineers were responsible, when in fact they were both highly responsible for the negligence.

## GOVERNMENT CONTROL OF THE RAILROAD FILL

The trial judge found that the occupancy and possession by the United States Government of the railroad fill was merely a token occupancy of the flimsiest sort; the government, of course, argues this finding with much vigor to evade not only the responsibility for negligence but also the doctrine of res ipsa loquitur.

It is well established that a Presidential proclamation made under the authority of an Act of Congress has the effect of law. The exclusive occupancy and possession of the railroads by the government, including the fill that failed, under the proclamation of the gov-

ernment was actual and real and legal, not "flimsy". As to this identical proclamation Judge Goldsborough of the District Court for the District of Columbia had this to say in U. S. v. Brotherhood, 79 F. Supp. 485, at 487:

> "The Court doesn't think at all that the fact that the government didn't see fit to change and alter the railway setup through the country, but decided to allow the railroads to be conducted in the usual manner unless and until it was finally determined that the negotiations would not be successful, in any way indicates that the United States didn't have actual control of the railroads and was not the employer of the employees of the seized carriers."

The proclamation of the President meant just what it said, the railroads including the fill in question, were in the actual and exclusive possession and control of the defendant government since May 10, 1948, and to and after the flood, as a matter of law, and the employees were the employees of the defendant government.

Not only as a matter of law was this fill in the exclusive possession and control of the United States, but also in fact. We call the Court's attention again to the conversation between Mr. Stanton, the General Superintendent of the railroad company, and the Army Engineers, in which they told him not to worry about the fill, they had men out there watching it. We also call attention of the Court to the exhibits in which the Department of the Army insisted upon daily reports as to the condition of the road beds and so forth (Exhibits 411 to 416, inclusive).

## ACTIVITIES OF OTHER AGENCIES

The government has attempted to avoid the consequences of its negligene of its employees in this case by endeavoring to convince this Court that the responsibility for the safety and the property of its tenants at Vanport was the responsibility of every agency, public and private, known to exist, other than the government. The government says in the brief that the Red Cross should have assumed responsibility for these people, or if not the Red Cross then Multnomah County, or if not Multnomah County, the State of Oregon, or the Drainage District in which Vanport was situated, or if not any of these then the property owners in the District.

By the property owners in Vanport, the government, of course, refers to Swift & Co. and the other commercial enterprises situated on the high ground next to the north dike, and the record shows that that is where the big boils were and that practically all of the work of sandbagging, ringing and so forth was done upon this north dike for the purpose of protecting the property of these commercial enterprises while the tenants lay unprotected on the low ground.

As far as the Red Cross is concerned, we submit that it is not the province or duty of the National Red Cross to fight either fire or flood, but to take care of the evacuees or sufferers after a disaster has struck. As far as the State of Oregon and Multnomah County are concerned, it would indeed be a remarkable state of affairs that would even permit the state or its agencies to

interfere with the government's operation of its own reservation or property. The state or its agencies have no more authority to move the government's tenants out of a housing project owned by such government than it would to evacuate the post master out of a federal building or the Indians off a reservation. As far as the Peninsula Drainage District No. 1 is concerned, the agreement between the government and the District, in which the District contracted to take care of the dikes, was entered into long before the government purchased the site of Vanport and the buildings were constructed thereon. In this connection the record shows without contradiction that the government owned 80 per cent of the area comprising the Drainage District and had purchased all of the pumping equipment, and through HAP was operating the pumping equipment at the time of and prior to the flood. With 80 per cent of the land of the District owned by the government and with everything the District had to fight a flood with being purchased by the government, we are unable to see how the old agreement originally drawn could have any application whatever with the facts in this case; furthermore, it was HAP's firemen and employees who took over the flood fighting and who were instructed in their fight by the Army Engineers.

In the brief of the government stress is laid upon a supposed doctrine of non-liability in cases where the government is acting in a so-called governmental capacity. The Federal Tort Claims Act makes no distinction between the acts and conduct of governmental em-

ployees while pursuing some "governmental" activity of the government as opposed to some "non-governmental" activity. The liability of the government is for the negligent acts of its employees and is dependent upon negligence, not upon the particular activity in which the government or the employees at the moment are engaged. We think little further need be said on this subject other than to call the Court's attention to the fact that, if there is ever a wholly non-governmental activity being engaged in by the government, it is being the landlord for and guardian of a lot of individual tenants and in operating a series of private apartment houses, which is wholly and solely a proprietory activity recently assumed by the government.

The government also makes a point of the assumption of the risk involved by the plaintiffs and the other residents of Vanport. The doctrine of Assumption of Risk, which is a doctrine relating to employer and employee, has no applicability in this case. But, even if it did have any applicability, the case is to be decided under the Federal Tort Claim Act by the laws of Oregon, and the law of Oregon is very plain to the effect that a defendant who makes assurances of safety or a promise to take care of an existing dangerous situation cannot claim either assumption of risk or contributory negligence on the part of the plaintiff when such assurances turn out to be false or such promises are not kept. In Dippold v. Cathlamet Timber Co., 111 Or. 199, 225 Pac. 202, the Supreme Court of Oregon had the following to say with reference to this subject:

"If the defendant, on being notified of the situation, re-enforces its statutory responsibility by its express promise to the plaintiffs to take care of the fire, it does not lie in the mouth of the defendant to say that the former were negligent in relying upon that promise" (111 Or. 211).

## ACT OF GOD OR EMERGENCY NOT APPLICABLE

We are unable to see any substance whatever to the government's claim that plaintiffs' loss resulted from an act of God or that a sudden emergency existed such as would excuse non-activities or passiveness of the employees and agents of the government herein. If attention had been paid to the orders of the Secretary of the Army and the brush and trees cleared from the railroad fill, or if the officials of HAP had acted after being told by Maderis that the fill was running muddy water, the leak or boil would have been treated and stopped or the people told to get out. The argument and cited cases of the government apply to cases where unusual action is necessary on the "spur of the moment" by officials in authority—they do not suggest in the least that such officials are justified in sitting idly by in utter disregard of plain duty and allow the emergency to develop over a period of a week or ten days and in addition call it an "act of God" when it does develop.

## THE DALEHITE CASE

The Dalehite case so much relied upon by the government is certainly not this case, and it is to be noted that the Supreme Court emphatically called attention to the fact that they were only deciding the case on the facts of that case. The main and controlling distinction is the fact that the rules and regulations for handling the explosives there in question were drawn up after careful research and promulgated by "cabinet level" authority and were *followed* by those of lesser responsibility. In this case the regulations governing action by lesser or field authorities were promulgated by the *Secretary of the Army* and were disregarded by the field engineers in charge at Vanport. We are convinced that in view of the minority opinion and the wide difference between the facts in the two cases, the minority opinion in that case controls the facts herein.

## MISREPRESENTATION

The language used by the courts in the Jones case and the Mid-Central Fish Co. case, of course, apply to the facts of those cases, and the facts in those cases are so far removed from the facts in this case that we are unable to see the value of either one of them here. It is so fundamental that the government should not, as a matter of plain reason, be held responsible for erroneous weather reports, etc. as scarcely to be open to argument.

In this case, however, the assurances of safety stemmed from utter negligence on the part of government agents and employees at a time and under circumstances while the government owed a particular duty to these tenant plaintiffs. The assurance under the particular circumstances existing became so interwoven with other circumstances creating liability as entirely to lose their identity as misrepresentations under the terms of the Tort Act and became negligent conduct of government employees.

## CONCLUSION

The trial court and the government put great reliance upon the provisions of the Flood Control Act, which contains an incidental provision to the effect that the government in no case shall be liable for flood damage. This provision was enacted a long time prior to the enactment of the Tort Claims Act. It is a general provision that the government in the construction of river and harbor improvements is not to be considered liable for floods. This act by its own terms is not applicable to the situation in the present case, where the damage sustained by the plaintiffs was occasioned by virtue of the government being their landlord. Generally a person is not liable for damage occasioned by heavy rains, but under some circumstances landlords are liable to their tenants when rains cause damage to the goods of the tenants in the leased premises.

Furthermore, in enacting the Tort Claims Act, and in making provision for those instances where the gov-

ernment is not to be held liable, the Congress did not include among the twelve exceptions any provision exempting it from liability for flood damage. The congressional committee report concerning the Tort Claims Act refers to non-liability in suits growing out of an authorized activity, such as a flood control project "where no negligence on the part of any Government agent is shown" (73 S. Ct. 964, Note 21). Congress failed to include negligently caused flood damage among the exceptions to liability and, hence, the provision relied upon by the government has unquestionably been superseded or repealed as far as the facts in this case are concerned. None of the cases cited by the government on this question is in point. They are all based upon a proposition of discretionary action by high or cabinet level officials, or in some cases by Congress itself.

As to the defenses on the facts asserted by the government, we are convinced that none is valid and that the evidence shows beyond any reasonable doubt a negligent course of conduct—actions and omissions—of government agents needlessly subjecting and exposing these plaintiffs to damage—to loss of their property and in fourteen instances to the loss of the lives of fourteen individuals.

The government in its brief has cited 184 cases, few of which in our opinion are at all applicable. The Tort Act is new, this is a new question under the Tort Act and, while we could cite the Court many cases on difference phases of this case which might in general terms apply here, time, space and real pertinency forbid prolonging this brief. It is said in the Good Book that of

making many books there is no end, and much study is a weariness of the flesh.

We respectfully submit that the judgment of the District Court should be reversed.

Respectfully submitted.

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No. 13869

# In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

JAY COMPANY, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## PETITION FOR REHEARING


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JAY COMPANY, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## PETITION FOR REHEARING

The National Labor Relations Board respectfully petitions this Court for a rehearing of that part of its decision of July 2, 1954, which set aside paragraph 1 (e) of the Board's remedial order, a provision designed to protect respondent's employees from further unlawful acts of interference, restraint and coercion by respondent. The Court, while sustaining the Board's findings of unfair labor practices, eliminated the said paragraph on the ground that "A blanket restraint is unwarranted" because "The evidence does not show extensive antiunion activities or activities of an aggravated character evincing an attitude of general opposition to rights of employees." We believe, however, that in so modifying the Board's order, the Court may have overlooked two important con-

siderations, discussed immediately below. These considerations were not presented to the Court in the briefs heretofore filed because, as appears *infra,* we were not aware that the scope of the order was in issue.

1. Under Section 10 (e) of the Act and the decisions of the Supreme Court and this Court, the validity of that paragraph of the Board's remedial order was not before this Court in the instant case. That Section provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

In his Intermediate Report (R. 56–57), the Trial Examiner found that the character and scope of respondent's unfair labor practices warranted the issuance of the remedial provision which this Court has refused to enforce. At no time, however, did respondent expressly urge before the Board that such a provision was improper.[1] Indeed, no such conten-

[1] Respondent's exception "To the matter appearing from line 14, page 10, to line 10, page 13" of the Intermediate Report (R. 63, item 14) does not satisfy the requirement of Section 10 (e) that the objection be sufficiently explicit to afford the Board "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 256. The above quoted exception was merely a *pro forma* objection, in general terms, to all of the Trial Examiner's recommendations (R. 58–60), and was not referred to in any manner in respondent's brief to the Board. "Such a general exception did not apprise the Board that [respondent] intended to press the question now presented" (*id.* at p. 255), and accordingly has not preserved for review any question relating to the scope of the

tion was made even in respondent's brief to this Court. Since no extraordinary circumstances are apparent which would excuse the failure to object to that part of the order, the propriety thereof would appear to be outside the area of contest on this review. See *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385; *N. L. R. B.* v. *Marshall Field & Co.*, 318 U. S. 253, 255–256; *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B.* v. *Pinkerton's National Detective Agency, Inc.*, 202 F. 2d 230, 233 (C. A. 9); *N. L. R. B.* v. *Van de Kamp's Bakeries*, 154 F. 2d 828 (C. A. 9); *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. A. 9).[2]

In the *Cheney California* case, *supra*, this Court had modified the Board's order by eliminating therefrom a remedial provision virtually identical with that involved in the case at bar. Because the company had not objected to the provision before the Board, however, the Supreme Court reversed the modification, holding (327 U. S. at 389):

> * * * Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or

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order. See also *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B.* v. *Van de Kamp's Bakeries*, 154 F. 2d 828 (C. A. 9); *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. A. 9).

[2] Cf. *N. L. R. B.* v. *Noroian*, 193 F. 2d 172 (C. A. 9); *N. L. R. B.* v. *Auburn Curtain Co.*, 193 F. 2d 826 (C. A. 1); *N. L. R. B.* v. *Pugh & Barr*, 194 F. 2d 217 (C. A. 4).

> neglect to urge such objection * * *" Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made.

Similarly in the *Pinkerton* case, *supra,* this Court held that where no question of the validity of a particular contract had been raised before the Board, the Court could not *sua sponte* consider the question and reverse the Board's finding of invalidity, even though the Court in another proceeding held that a similar contract was valid. And in both the *Van de Kamp* and *Kinner* cases, 154 F. 2d at 828 and 1007, this Court, which had originally declined to enforce the "broad" provisions of the Board's orders in those cases, reconsidered the matter and enforced the orders in full in accordance with the *Cheney* case.

We therefore submit that since the propriety of paragraph 1 (e) of the Board's order was not raised before the Board, and since presentation of that question to the Board was "a prerequisite to judicial review" (*Pinkerton* case, 202 F. 2d at 233), the Court should reconsider its decision and should enforce that provision of the Board's order.

2. We further submit that even if the propriety of the Board's order were properly before the Court, the order should be enforced in full, since it constituted a reasonable exercise of the Board's authority "to prevent violations, the threat of which in the future is indicated because of their similarity or re-

lation to those unlawful acts which the Board has found have been committed by the employer in the past." *N. L. R. B.* v. *Express Pub. Co.,* 312 U. S. 426, 436–437.

The serious nature of the unfair labor practices which the Board and this Court found respondent to have committed fully warrant the Board's determination that a broad cease and desist order is necessary "to prevent the employer * * * from engaging in any unfair labor practice affecting commerce." *May Dept. Stores* v. *N. L. R. B.,* 326 U. S. 376, 390. As this Court has recognized, respondent advocated the formation of a company union,[3] entered into and enforced an illegal union security agreement with such a union, discharged an employee for his role in disbanding the company union, locked out its employees, and threatened to close the plant unless the company union was reestablished. In short, the Company acted in flagrant disregard of the employees' rights guaranteed by Section 7,[4] and the Board could therefore properly find that "danger of [violation of that Section] in the future is to be anticipated from the course of [the employer's] conduct in the past." *N. L. R. B.* v.

[3] Respondent also promised benefits to the employees if they would form their own union rather than affiliate with an "outside union" (R. 47, 66; 172–173).

[4] Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities * * *."

*Express Pub. Co.*, 312 U. S. 426, 437.[5] It follows that the order prohibiting future violations of that Section was entirely proper. See *N. L. R. B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752, where this Court stated:

> Because of the coercive practices discussed * * * above the Board anticipated possible future misconduct on respondent's part, and accordingly ordered it to cease and desist from infringing in any manner any right guaranteed. In view of the conclusion we have reached [sustaining the finding of coercive practices], we are not able to say that the omnibus order is unwarranted.

Cf. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 192–193, cautioning against decrees "so narrow as to invite easy evasion." In this connection it should be noted that the order as modified by the Court contains no prohibition whatsoever against "interference, restraint, or coercion," notwithstanding that respondent by the conduct summarized above plainly committeed acts which interfered with, restrained, and coerced the employees.[6]

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[5] In *Express Publishing* the Supreme Court, in holding that a broad order was inappropriate, stated that a contrary result had been properly reached in cases where "the unfair labor practices did not appear to be isolated acts in violation of the right of self-organization, like the refusal to bargain here * * *" 312 U. S. at 437–438. Respondent's numerous violations in this case can scarcely be characterized as an "isolated act."

[6] We respectfully suggest that *N. L. R. B.* v. *Nesen*, 211 F. 2d 559 (C. A. 9), which is cited to support the modification of the order in this case, does not require such a result. In *Nesen* the court's original decree, entered on consent, contained a broad cease and desist order. See decree in No. 13204 on the docket of this Court. In subsequent proceedings the Court found Nesen in contempt of other provisions of the decree. Nesen's violation of

Accordingly, even if the propriety of the Board's order were open to review, we submit that it can fairly be said that the violations enjoined by the Board "bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *Express Publishing, supra,* 312 U. S. at 437.

## CONCLUSION

For these reasons, it is respectfully submitted that the petition for rehearing be granted, and that upon rehearing the Court enforce the Board's order in full as prayed in the petition for enforcement.

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*National Labor Relations Board.*

JULY 1954.

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the broad order was not in issue in the contempt proceeding. Similarly we are not concerned here with the court's power to shape its remedy in contempt proceedings.

CERTIFICATE OF COUNSEL

A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for purposes of delay.

A. NORMAN SOMERS,
*Assistant General Counsel,*
*National Labor Relations Board.*

WASHINGTON, D. C., *July 26, 1954.*

U. S. GOVERNMENT PRINTING OFFICE: 1954

No. 13870

# United States Court of Appeals
## For the Ninth Circuit

HAZEL ANNA WOLF, *Appellant,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization, *Respondent.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

## BRIEF OF APPELLANT



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# United States Court of Appeals
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| HAZEL ANNA WOLF, | *Appellant,* | No. 13870 |
| vs. | | |
| JOHN P. BOYD, District Director, Immigration and Naturalization, | *Respondent.* | |

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

## BRIEF FOR APPELLANT

### JURISDICTIONAL STATEMENT

**A. Statutory provisions believed to sustain jurisdiction.**

Jurisdiction of the District Court was invoked under the provisions of Title 28, U.S.C. §2241, 62 Stat. 964, as amended, particularly as follows:

> "(a) Writs of habeas corpus may be granted by * * * district courts * * * within their respective jurisdictions. * * *
>
> "(c) The writ shall not extend to a prisoner unless—he is in custody under or by color of authority of the United States. * * * "

Jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under the provisions of Title 28,

U.S.C. §2253, 62 Stat. 967, as amended, particularly as follows:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. * * * "

**B. Statutes, the validity of which is involved.**

8 U.S.C. 137 (c), (d), (e) and (g)—Act of October 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673):

> "Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * *
>
> "(c) Aliens who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or all forms of law * * * .
>
> "(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d)
>
> * * *
>
> "(g) Any alien who was at the time of entering the United States or has been at any time there-

after, a member of any one of the classes of aliens enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * * .

**C. References to pleadings showing existence of Jurisdiction**

Appellant's "Petition for Writ of Habeas Corpus * * * " (R. 1 & 2) states the statutory and factual basis of jurisdiction in that petitioner was in custody under color of authority of the United States, and Respondent conceded that the court had jurisdiction (R. 12).

## CONCISE STATEMENT OF THE CASE

In view of the fact that appellant intends to urge errors of law, on admitted facts, it is sufficient to refer to the admitted pleadings as shown by respondent's return to show the questions involved, and the manner in which they are raised.

Appellant is a permanent resident of Seattle, King County Washington, and has resided continuously in the United States of America since December 26, 1922; that she was prior to entry a native of Canada and entered the United States for permanent residence; and has at all times thereafter intended and attempted to become a United States citizen (R. 3, 12).

That thereafter appellant was arrested by respondent and deportation hearings were held looking toward the deportation from the United States of appellant

under the provisions of the Act of October 16, 1918, as amended (8 U.S.C. §137) but prior to the amendment of said Act by the Internal Security Act of 1950 (8 U.S.C. §137) (R. 22).

That following a hearing the Assistant Commissioner, Adjudications Division, Department of Justice, Immigration and Naturalization Service, adopted the recommended order and decision of the Hearing Officer "that respondent was during 1937 and 1938 a member of the Communist Party," and concluded, as a matter of law, that under the Act of October 16, 1918, as amended, the respondent is subject to deportation (R. 26, 27).

Upon exhausting administrative remedies by appeal to the Board of Immigration Appeals, the appeal was dismissed and respondent directed appellant to produce herself for deportation from the United States, whereupon the within action was instituted in Federal District Court (R. 27).

The court thereupon ruled as a matter of law, and thereby presented the issues now raised on appeal, as follows:

Past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien pursuant to the provisions of 8 U.S.C. 137 as it existed prior to amendment of said action by Section 22 of the Internal Security Act of 1950 (Public Law 831, 81st Congress, 2nd Session, 64 Stat. 1006) (R. 28).

The Act of October 16, 1918, as amended by the Act of June 28, 1940 (8 U.S.C. 137) providing for deportation of non-citizens who, after entry, became members of an organization which has thereafter been found by Congress to be an organization which advocates the overthrow of the government of the United States by force or violence is not unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth amendment, and the *ex post facto* prohibitions of Article I, Section 9, Clause 3 of the Constitution of the United States (R. 29).

## SPECIFICATION OF ERRORS

A. The district court erred in concluding that past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of a non-citizen pursuant to the provisions of 8 U.S.C.A. §137 as it existed prior to amendment of said section by section 22 of the Internal Security Act of 1950.

B. The court erred in concluding that "The Act of October 16, 1918, as amended by The Act of June 28, 1940 (8 U.S.C. §137) providing for deportation of aliens who, after entry, became members of an organization which advocates the overthrow of the Government of the United States by force or violence is not unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth Amendment, and the *ex post facto* prohibitions of Article I, Section 9, Clause 3 of the Constitution of the United States.

## SUMMARY OF ARGUMENT

**A. Membership in the Communist party prior to the Internal Security Act of 1950 was not alone a ground for deportation.**

Under the statute upon which the proceedings were based, the order of deportation having been based upon 8 U.S.C. §137 as it existed prior to the amendment of said section by Section 22 of the Internal Security Act of 1950, mere past membership in the Communist Party was not, as a matter of law, a sufficient ground for deportation, but the statute required proof that the non-citizen had been a member of an organization that advocated and taught the overthrow of the government of the United States by force and violence.

The court based this decision on the case of *Martinez v. Neelly,* 197 F.(2d) 462, affirmed by a four to four decision of the U. S. Supreme Court, 97 L.ed. (Advance p. 275).

It is submitted that the *Martinez* case was wrongly decided in that it based its decision on the Internal Security Act of 1950 without any opportunity for a challenge to the constitutionality of the Internal Security Act of 1950, and without argument thereon.

In thus deciding this case the court avoids, and thereby virtually concedes a failure to prove that appellant had at one time belonged to an organization which was proscribed under the statute under which the government proceeded by warrant against appellant, and based its decision upon a statute which appellant had no opportunity to attack. This failure to permit appellant to be heard denies due process.

The Internal Security Act of 1950 (Subversive Activities Control Act of 1950, Section 22 (Public Law 831, 81st Congress, 2nd Session, 64 Stat. 1006, 8 U.S.C. §137), is not involved in any way in these proceedings because the warrant of arrest and proceedings held thereunder, and from which review is sought, were not based on that Act.

**B. Deportation cannot constitutionally be ordered for the alleged commission of an act which Congress had not proscribed at the time the act is alleged to have been committed, and cannot constitutionally be ordered of one who came to the United States as a permanent resident and settler in 1922 and has never violated the conditions then established for her continued residence therein.**

Deportation for the alleged commission of an act which Congress did not impose as a condition to a continuation of "permanent" residence in the United States at the time the non-citizen established such "permanent" residence in 1922 is *either* a denial of substantive due process and completely without the constitutional power of Congress *or* it is in violation of the First Amendment, and the *ex post facto* prohibitions of Article I, Section 9, of the Constitution of the United States. See: "The Settler Within Our Gates," 26 New York University Law Review No. 2, 3, & 4, and "Deportation as a Denial of Substantive Due Process," by Stimson Bullitt, 28 Washington Law Review, No. 3, 205.

Appellant is being expelled for membership in the Communist Party "in 1938 and 1939." Membership,

as such, did not subject a non-citizen or alien to expulsion until the passage of the Internal Security Act of 1950, 64 Stat. 1008. It was not an expellable act at the time of appellant's alleged membership, and it certainly was not an expellable act at the time of appellant's arrival in the United States in 1922, and the non-membership in the Communist Party was never made a condition for her continued residence in the United States.

As will be shown by the argument hereafter, prior cases have *assumed* that the power to deport an alien is absolute, and that Congress could order the deportation of all aliens on *any* ground. The substantive due process issue here raised was not raised and considered in any of the basic arguments, save possibly in *Harisiades v. Shaughnessy,* 345 U.S. 580, and the case is distinguishable from the one at bar.

Likewise, the courts' prior rulings, giving priority over the assumed right or power to expel over the express guarantee of the Fifth Amendment, and the prohibition against *ex post facto* laws have always been demonstrably based upon *dicta* contained in the Chinese Exclusion case (*Chae Chan Ping v. United States,* 130 U.S. 581 (1889) and *Fong Yue Ting v. U. S.,* 149 U.S. 697 (1893) and subsequent cases prior to *Harisiades* (*supra*) also do not represent actual holdings.

Similarly, because the leading cases were not concerned with the power to deport settlers legally and permanently resident in the United States, and were actually concerned with the power "to exclude," little thought, if any, was given to the fact that the

court was giving priority to an assumed right to deport, which was in turn based upon the right to exclude, and this power was forming the basis for overriding the express guarantees of the Constitution.

## ARGUMENT

**I. The court cannot legally assume that membership in the Communist Party in 1938 and 1939 alone can support a deportation order based upon the Internal Security Act of 1950 when appellant is not given an opportunity to attack the constitutionality of that act.**

Appellant was ordered deported by the Assistant Commissioner for Adjudications, Department of Justice, Immigration and Naturalization Service for alleged membership in 1938 and 1939 in an organization alleged to advocate the overthrow of the Government of the United States by force and violence (R. 18).

Appellant argued in the administrative hearing (Respondent's Exhibit A) and in the District Court that she was not a member of an organization advocating the overthrow of the government by force and violence.

*Kessler v. Strecker,* 307 U.S. 22, 30, 31, 83 L.ed. 1082, 1088 decided April 17, 1939 and *Dennis v. United States,* 341 U.S. 494, 95 L.ed. 1137 both support appellant's position that the Communist Party did not advocate the overthrow of the government in 1938 or 1939, since the *Dennis* case points out that the government contended a conspiracy to overthrow the government of the United States by certain named defendants did not commence until 1945.

Appellant also argued that only two of the government's witnesses, Paul Crouch and John Leech (Respondent's Exhibit A) submitted any testimony on this issue, and the witnesses who believed appellant to have been a member based upon their own alleged membership denied that the Communist Party so advocated.

To avoid ruling on this question the court ruled that mere membership in the Communist Party in 1938 or 1939 was, as a matter of law, ground for deportation, and based this decision on *Martinez v. Neelly,* 197 F.(2d) 462 (affirmed by a four to four decision of the Supreme Court on January 12, 1953 in 97 L.ed. .... (Advance p. 275).

Appellant submits that due process required that she be given the opportunity to attack at the outset the constitutionality of any act which is being used as a legal ground for ordering her deportation, and that the court by following the *Martinez* case (*supra*) denied her due process of law, and in fact conceded that the government had failed to prove deportability under the act as it existed during her hearing, namely, under 8 U.S.C. §137 wherein proof that the named organization was one which did in fact advocate the overthrow of the government by force and violence was required.

**II. The power of expulsion or deportation of legally resident settlers cannot legally be equated with the exclusion power, and the United States Supreme Court has never held, in other than dicta, to the contrary.**

The ultimate question in this case, as in *Harisiades v. Shaughnessy,* 342 U.S. 716, is whether the United States constitutionally may deport a legally resident alien because of alleged membership in the Communist Party which terminated before enactment of the Alien Registration Act of 1940 (54 Stat. 670, 8 U.S.C. §137).

There are significant factual differences. It is admitted that appellant came to the United States on December 26, 1922, as a permanent settler, and she has at all times herein mentioned intended and attempted to become a United States citizen (R. 3, 12).

Another basic difference pertains to the fact that *Harisiades* did not question a finding which was approved by the District Court, that the Communist Party during the time he was a member (which commenced in 1925), taught and advocated the overthrow of the Government of the United States by force and violence.

The *Harisiades* case (*supra*) in effect, held that the power of Congress to expel non-citizens was as broad as the power to exclude aliens in the first instance. In justification of this rule the court relied upon past decisions of the court (See Note 11) none of which are in point, and in discussing the matter, stated that Harisiades had perpetuated "a dual status as an American inhabitant but foreign citizen" and that "as an alien, he retains a claim upon the state of his citizen-

ship to diplomatic intervention on his behalf." The court continued to develop the distinction by stating that Harisiades "by withholding his allegiance from the United States * * * leaves outstanding a foreign call on his loyalties which international law not only permits our government to recognize but commands it to respect."

These statements do not square with the facts in this case. However, in addition we advert to the legal authority for the court's position that expulsion is based on authority or power inherent in every sovereign state, and that it is a weapon of "defense and reprisal."

Congressional power in immigration matters stems primarily from Article I, §8, Clause 2, of the Constitution which delegates to Congress the power "To regulate Commerce with foreign Nations;" and it is also said to be based upon national sovereignty.

Importation of goods is called commerce; importation of persons is a type of commerce called immigration. Constitutionally, however, the same power is involved. (cf. *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304.) Thus in the *Chinese Exclusion Case* (1889) 130 U.S. 581, and *Nishimura Ekiu v. United States* (1892) 142 U.S. 651 it was decided that the power to exclude arises from the very nature of immigration, and in the *Ekiu* case (*supra*) relied upon the case of *Hilton v. Merritt* (1884) 110 U.S. 97, which involved the importation of goods, and thus illustrates the recognized constitutional interconnection between the importation of goods, and the immigration of persons.

When the power of the government to deport is considered there is no express power, and by the terms of the Constitution persons who are legally resident in the United States are entitled to the substantive freedoms guaranteed in the Bill of Rights (See *Bridges v. Wixon,* 326 U.S. 135, 160). We submit that this is the fact, despite *dicta* to the contrary which, in fact, would maintain that every non-citizen may constitutionally be deported for whatever reason it may choose, limited only by the due process requirement of a fair hearing.

However, appellant submits that Congress in passing the Immigration and Nationality Act of 1952, 66 Stat. 163 (1952) 8 U.S.C. §§1101 *et seq.* (Supp. 1953) commonly known as the McCarran-Walter Act, denied the latter position in so many words, as follows:

> "The power of Congress to control *immigration* stems from the sovereign authority of the United States as a nation and from the constitutional power of Congress to *regulate commerce* with foreign nations. Every sovereign nation has power, inherent in sovereignty and essential to self-preservation, to forbid entrance of foreigners within its dominions, or to *admit them* only in such cases and *upon such conditions as it may see fit to prescribe.* Congress may exclude aliens altogether or *prescribe terms and conditions upon which they may come into or remain* in this country."
>
> House Report No. 1513, March 13, 1952, p. 5. (Emphasis supplied)

The first case decided by the Supreme Court that involved deportation rather than entry, expulsion because of illegal entry, or proof of lawful entry, was

*Zakonaite v. Wolf* (1912) 226 U.S. 272 (For a discussion of all prior leading cases see Boudin, "The Settler Within Our Gates, 26 N.Y. U.L.Q., 266-290, 451-474, 634-662).

This case involved the Act of 1907, 34 Stat. 900, which provided that:

> " * * * any alien woman * * * who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years, after she shall have entered the United States, *shall be deemed* to be unlawfully within the United States and shall be deported. * * * "

This could be interpreted as a presumption that the alien had violated a condition precedent, the authority for which is unquestioned, rather than the violation of a condition imposed subsequent to entry.

In this regard the court stated on page 275:

> "It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend. * * * "

In support of this quotation the Court cites seven cases, none of which involved the expulsion of a lawful permanent resident alien. The second case cited is *United States v. Zucker* (1896) 161 U.S. 475, which did not involve immigration, but upheld a subsequent forfeiture of goods that had been allowed entry because of fraudulent concealment of their value *at the time of entry.*

Thus it is clear that the power to expel is based properly upon the power to exclude, and is only understandable when it is related to that power, in that effective exercise of the power to exclude requires the auxiliary power to deport aliens who had recently and illegally entered.

The difference between deportation and exclusion was clearly stated by Justice Holmes in *Chin Yow v. United States* (1908) 208 U.S. 8, 12 relating to a man excluded as an alien, and who was denied a hearing to pass upon his claim of citizenship, as follows:

> "It would be difficult to say that he was not imprisoned, theoretically, as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take. * * * "

Deportation of a settled resident is clearly far more than exclusion, and, although the whole includes all of its parts, it is still true that a part does not include the whole. Similarly, the power to exclude does not carry with it the much greater power, from the standpoint of the non-citizen, of deportation without any protection under the Constitution save procedural due process. (See Dissenting opinion of Mr. Justice Douglas in *Harisiades v. Shaughnessy, supra*).

Further, the true reason why the *ex post facto* provision was not held to apply to early deportation cases points up the fundamental difference between expulsion and exclusion. Thus the case of *Bugajewitz v.*

*Adams* (1913) 228 U.S. 585, involved the expulsion of a woman found in a house of prostitution, and was brought pursuant to the provisions of the Act of 1910, 36 Stat. 265, which eliminated a three year limitation under the 1907 Act. The deportation order was contested upon the constitutional ground that this was an *ex post facto* law, and upon the ground that the Act deprived the alien of her rights to jury trial, etc. Justice Holmes dealt with the *ex post facto* argument by saying:

> " * * * The prohibition of *ex post facto* laws * * * has no application * * * and with regard to the petition, it is not necessary to construe the statute as having any retrospective effect." (at p. 591).

This has meaning because, since the Act of 1903, 32 Stat. 1213, which was in effect in 1905 when the alien entered the United States, provided for the expulsion of prostitutes, and since the 1910 act struck out the three year statute of limitations and thereby rendered the alien subject to expulsion, it must necessarily have inferred that she could have been expelled or have been excluded at the threshhold under the then existing law for being a prostitute. Otherwise the statement that it is unnecessary to construe the statute as having any retrospective effect is meaningless, or patently false.

Further there was no pretense that after a five year stay, with no family, and her criminal activity while here she had become a rooted settler.

As has been pointed out above, and discussed fully in the Boudin article, 26 New York University Law Quarterly 266-290, 451-474, 634-662 (*supra*) and the

Bullitt article in 28 Washington Law Review 205, 217 (*supra*) the reason for the uniform *dicta* in the prior cases have been the "imaginary precedents" of *The Chinese Exclusion* and *Fong Yue Ting* cases (*supra*) and the *dicta* of later cases which were based upon the former, and the reasoning of the *Fong Yue Ting dicta* which if closely examined cannot be persuasive.

To return to the original basis of comparison between commerce and immigration, if unilateral conditions cannot be added to a contract governing property rights, then surely they cannot be imposed upon a status the loss of which deprives one of "all that makes life worth living."

To conclude, it is again submitted that the *implied* authority of deportation cannot be given priority over the express guarantees of the First, and Fifth Amendents of the United States Constitution, and Article I, Section 9 of the United States Constitution prohibiting *ex post facto* laws. Further, it is submitted that there is no rational basis for the arbitrary preference for the natural born among persons all of whom have acquired roots in the United States as a result of permanent residence, and therefore this class discrimination is a denial to deep-rooted aliens of the equal protection of our laws. Bullitt, Due Process in Deportation, 29 Washington Law Review 219.

As stated in the above cited article:

> " * * * the extension of the 1st Amendment to limit state power is a more drastic step than to read the Equal Protection clause into the Due Process clause of the 5th. By the latter, the Unit-

ed States would restrict its own powers and tend to harmonize its amendments. The 14th Amendment authorizes Congress to enact legislation to enforce the prohibition of a state's denial of equal protection. It should follow that it would be inhibited from doing itself what it is expressly authorized to prevent states from doing. The Supreme Court often tests the validity of federal legislation as to discrimination and classification under the Due Process Clause of the 5th Amendment by the same rules of equality that are employed to test the validity of state legislation under the Equal Protection clause of the 14th." (p. 219).

* * *

Also:

"It has been repeatedly held that despite the absence of an equal protection clause to check Congress, discriminatory Federal legislation may be so arbitrary and injurious as to be invalid as a violation of the Due Process clause." (p. 220).

Since appellant has not violated any condition that Congress can constitutionally impose upon her continued residence in the United States, the order of deportation should be set aside, and appellant should be released from the further custody of the Attorney General.

C. T. HATTEN,
*Attorney for Appellant.*

Dated, Seattle, Washington.
September 24, 1953.

No. 13870

IN THE

# United States Court of Appeals

## FOR THE NINTH CIRCUIT

HAZEL ANNA WOLF,

*Appellant,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization,

*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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HONORABLE WILLIAM J. LINDBERG, *Judge*

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## BRIEF OF APPELLEE

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## JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is invoked under the provisions of Section 2241, Title 28, U.S.C., and of this court under Section 2253, Title 28, U.S.C.

## STATUTES INVOLVED

The statutes involved are Title 8, United States Code, Section 137 (c), (d), (e) and (g), Act of October 1918 (40 Stat. 1012); Act of June 5, 1920 (41 Stat. 1008) and Act of June 28, 1940 (54 Stat. 673), the provisions of which are set out in appellant's brief at page 2.

In addition to this, there is also involved the Administrative Procedure Act (Title 5 U.S.C. Sec. 1009), which provides:

> Sec. 1009. *Judicial Review of Agency Action*
>
> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> (a) Any person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *"

## STATEMENT OF THE CASE

With appellant's statement of the case we have no quarrel and therefore have no counter statement since questions of law only are presented on this appeal (App. Br. p. 3).

## THE DISTRICT COURT'S DECISION

Before the entry of findings, conclusions and decree and after the District Court rendered its oral decision in this case, the court prepared and filed a memorandum opinion (R. 32-38) showing a clear understanding of the issues involved and giving a scholarly discussion of the legal questions involved, which we contend are sound and irrefutable.

In this memorandum opinion the district court, in relation to the findings of the Administrative body posed these questons:

(1) Are the findings of fact supported by substantial evidence?

(2) In the absence of substantial evidence that the Communist Party is or was an organization advocating the forcible overthrow of the Government, may an order of deportation be entered on the basis of membership in the past in that party under the laws that stood prior to the enactment of the Internal Security Act of 1950?

(3) Is past membership in the Communist Party "as a matter of law" a sufficient

ground for deportation under the laws that stood prior to the enactment of the Internal Security Act of 1950?

(4) Does Section 10 of the Administrative Procedure Act provide an appropriate method of obtaining judicial review of a deportation order?

(5) Does not the Administrative Procedure Act impose a positive statutory duty upon a reviewing court to review the record as a whole and to determine whether the order being challenged is supported by substantial evidence?

(6) Is an administrative hearing with respect to which adequate procedures have not been adopted to insure the impartiality of the presiding inspector a fair hearing, as required by the due process clause of the Fifth Amendment?

(7) Is the Act of October 16, 1918 as amended by the Act of June 5, 1920, as further amended by the Act of June 28, 1940 (8 U.S.C. 137) unconstitutional, as being in violation of the First Amendment, the due process clause of the Fifth Amendment, and the ex post facto?

The memorandum opinion shows clearly (R. 34) that the district court considered the case and arrived at its conclusion exclusively as one directed toward the issuance of a writ of habeas corpus, and that the rights of appellant come within the provisions of the Administrative Procedure Act as now applicable to the deportation proceedings in issue, and are fully re-

viewable by the court in this habeas corpus proceeding. (R. 34-5).

Continuing the memorandum opinion states (R. 35):

> "Are the findings of fact supported by substantial evidence? The hearing records of the Immigration and Naturalization Service * * * while containing a substantial amount of testimony in both cases (this and the Luckman case) is well in excess of one thousand pages. The court has reviewed the record * * * and is of the opinion that *the findings of the Assistant Commissioner are supported by substantial evidence*, i.e., evidence relevant to the issue upon which the findings were made, which a reasonable mind might accept as adequate to support such conclusion."

The memorandum opinion further shows that the district court's review of the voluminous record reflects that appellant elected to remain silent and refused to testify in her own behalf (R. 36).

The district court concluded in its memorandum decision that the first and second questions presented were disposed of by the court's finding that "there is substantial evidence * * * to justify the Assistant Commissioner's findings."

> "The third question is disposed of by the decision of the Seventh Circuit Court of Appeals in *Martinez v. Neely*, 197 F. (2d) 462 (affirmed by four-to-four decision of the Supreme Court announced January 12, 1953, since reported in 344 U.S. 916.

The District Court, continuing in its memorandum decision said (R. 36-7):

> "Considering next the fourth and fifth questions presented in petitioners' memorandum of authorities, again the court, as already indicated, has reviewed the record as a whole to determine whether the order of deportation is supported by substantial evidence and has made a positive finding on that issue.
>
> In considering the question of the applicability of the Administrative Procedure Act to judicial review of a deportation order this court adopts the view and reasoning of Judge Holtzoff as stated in *U. S. v. Watkins*, 73 F. Supp. 216, wherein he holds that in a habeas corpus proceeding to review an order of the Immigration and Naturalization Service, it is not enough that there be some evidence to sustain the findings of fact, but that they must be supported by substantial evidence.
>
> As to the sixth question presented by petitioner's memorandum a review of the whole record does not establish that petitioner * * * was denied a fair hearing or due process in any respect. No evidence de hors the record has been offered to so show and even if it be admitted that the Immigration and Naturalization Service failed to follow the requirements of the Administrative Procedure Act as alleged * * * in * * * exceptions to the finding of the hearing officer it is doubtful if the issue would be other than academic as far as this proceeding upon a petition for writ of habeas corpus is concerned, inasmuch as Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C., Secs. 1004, 1006, 1007) upon which petitioners rely, are no longer applicable to deportation proceedings (Pub. Law 843, 81st Congress, 2nd Session, 64 Stat. 1048, enacted Sep-

tember 27, 1950) *Vergas v. Shaughnessy* 97 F. Supp. 335.

Finally, as to the seventh question presented by petitioner's memorandum the issue as to the constitutionality of the Act or Acts here involved have been disposed of contrary to petitioner's contention by the Supreme Court's decision in the case of *Harisiades v. Shaughnessy*, 342 U.S. 580. Petitioner's attempt to distinguish the facts existing in that case from the situation here presented are not persuasive." (R. 38).

## APPELLANT'S CONTENTIONS

Appellant is content to rest her appeal on two legal grounds. Her contentions as we understand them to be are:

(A) That past membership in the Communist Party is *not*, as a matter of law, a sufficient ground for deportation of a noncitizen under the provisions of Title 8, Sec. 137, U.S.C. as it existed prior to amendment thereof by Section 22 of the Internal Security Act of 1950 (T. 8, Secs. 137 and 138, U.S.C.).

(B) That the Act of October 16, 1918, as amended by the Act of June 28, 1940, (8 U.S.C. Sec. 137) providing for deportation of aliens who, after entry, became members of an organization which advocates the overthrow of the Government of the United States by force and violence is unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth Amendment, and the expost facto prohibitions of Article 1, Section 9, Clause 3 of the Constitution of the United States."

## ARGUMENT

With but these two contentions to be considered we submit that all phases thereof have heretofore been decided adversely to appellant as we shall presently show, and the judgment of the District Court should be affirmed.

Prior to September 27, 1950, the date of the enactment of the Internal Security Act, the existing law (the Act of October 16, 1918 as amended, (8 U.S.C. 137)) provided:

> "Any alien who, at any time, shall be or shall have been a member of one of the following classes *shall be excluded* from the United States:
>
> * * * (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States.
>
> * * *
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, any written or printed matter of the character described in subdivision (d) (advising, advocating, or teaching the overthrow of the Government of the United States.)
>
> * * *

(g) Any alien who was at the time of entering the United States, *or has been at any time thereafter*, a member of any one of the classes of aliens enumerated in this section (Section 137, Title 8) shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in sections (enumerated) of this title.

*The provisions of this section shall be applicable* to the classes of aliens mentioned therein, *irrespective of the time of their entry into the United States.*" (Italics ours)

The constitutionality of this statute, and that it was not an *expost facto* law was determined by the United States Supreme Court in *Harisiades v. Shaughnessy*, 342 U.S. 580.

That case included Harisiades, a Greek, Mascitti, an Italian, and a Mrs. Coleman, a Russian, all of whom were under orders of deportation. The opinion discloses that Harisiades, the Greek, came to the United States in 1916. He joined the Communist Party in 1925 and his membership therein was terminated in 1939. A warrant for his deportation because of his membership was issued in 1930, but was not served until 1946. After hearings, he was ordered deported on the ground that *after entry he had been a member of an organization which advocates the overthrow of the Government by force and violence.*. He sought release by habeas corpus, which was denied by the

district court, 90 F. Supp. 397. The Court of Appeals for the Second Circuit affirmed, 187 F. (2d) 137.

Mascitti, the Italian, came to this country in 1920. He was a member of the Communist Party between 1923 and 1929. He quit the party in 1929. A warrant for his deportation was issued and served in 1946. He sought relief by declaratory judgment which was denied without opinion by a three-judge district court for the District of Columbia. His case reached the Supreme Court by direct appeal.

Mrs. Coleman, the Russian, was admitted to the United States in 1914. She was a member of the Communist Party for about a year, beginning in 1919, and again from 1928 to 1930, and again from 1936 to 1937. She had been ordered deported because *after entry she became a member of an organization advocating overthrow of the Government by force and violence.*

She sought an injunction on constitutional grounds among others. Relief was denied, by a three-judge district court, without opinion, and her case reached the Supreme Court by direct appeal.

In the instant case, appellant Hazel Anna Wolf, a Canadian, born in Victoria, B. C., came to the United States December 26, 1922, and has never been naturalized. She was a member of the Communist Party

during 1938 and 1939. She was arrested May 31, 1949. After hearing she was ordered deported on the ground that after entry she had been a member of an organization which advocates the overthrow of the government by force and violence. She sought release by habeas corpus which was denied by the district court and brings this appeal.

As in those cases, included in the Harisiades case, we have in this case a finding by the Administrative board, which the district court held was supported by substantial evidence, that the Communist Party, during the period of appellant's membership, taught and advocated overthrow of the Government of the United States by force and violence. See Asst. Commissioner's findings in the Administrative record, (Ex. "A") where finding IV reads:

> "That during the period of the respondent's membership therein, the Communist Party of the United States of America advocated and taught the overthrow by force and violence the Government of the United States."

See also Hearing Officer's finding No. V, contained in Ex. "A".

Counsel for appellant argues (App. Br. p. 9) that the court cannot legally assume that membership in the Communist Party in 1938 and 1939 alone can support a deportation order based upon the Internal

Security Act of 1950, when appellant is not given an opportunity to attack the constitutionality of that Act.

In the first place, there is no room for "assumption" where there is direct evidence of the fact, that "during the period of respondent's (appellant's) membership therein, the Communist Party advocated and taught the overthrow by force and violence of the Government of the United States."

In the second place, the deportation order herein *is not* based upon the Internal Security Act but *is* based upon the Act as it existed *prior* to the passage of the Internal Security Act of 1950.

It seems to us that the following cases are conclusive on this question:

*Martinez v. Neelly*, 197 F. (2d) 462 (affirmed 344 U.S. 916);

*Galvan v. Press* (9th Cir.) 201 F. (2d) 302.

In the latter case this court said:

> "Appellant contends that the Internal Security Act of 1950, 8 U.S.C. Sec. 371, as amended, 1950, infringed his constitutional rights as guaranteed by the Fifth Amendment, by making membership in the Communist Party a basis for deportation. We hold that *Harisiades v. Shaughnessy*, 1952, 342 U.S. 580, 72 S.Ct. 512, and *Carlson v. Landon*, 9 Cir. 1950, 186 F. (2d) 183, and *Carlson v. Landon*, 187 F. (2d) 991, are in direct opposition to appellant's contention, inasmuch as each of the cases holds that Congress has plenary power to

provide for the expulsion or deportation of aliens."

Again in appellant's brief at page 9, it is said:

"Appellant argued in the Administrative hearing (Respondent's Exhibit A) and in the district court that she was not a member of an organization advocating the overthrow of the Government by force and violence."

It is true that her counsel so argued, but the fact is, that appellant herself, although given ample opportunity to testify in her own behalf remained mute and refused to so testify. (Ex. A, R. 36).

"Silence is often evidence of the most persuasive character."

*Bilokumsky v. Tod*, 263 U.S. 149;
*Chan Nom Gee v. U. S.*, 57 F. (2d) 646.

What was decided in *Kessler v. Strecker*, 307 U.S. 22, was that the then Act reached only aliens who were members when the proceedings against them were instituted.

In the footnote at page 589 of the Harisiades case (342 U.S. 580), we find the following:

"When this court, in 1939, held that the Act reached only aliens who were members when the proceedings against them were instituted, *Kessler v. Strecker*, 307 U.S. 22, Congress promptly enacted the statute before us, making deportation mandatory for all aliens who at any time past

> have been members of the proscribed organizations. In so doing it also eliminated the time limit for institution of proceedings thereunder. Alien Registration Act 1940, 54 Stat. 670, 673."

So, it is not true, as stated by counsel for appellant that the Kessler and Dennis cases mentioned at page 9 of the brief, both support appellant's position that the Communist Party did not advocate the overthrow of government in 1938 or 1939.

The Dennis case (341 U.S. 494) merely held that the conspiracy by certain named defendants did not commence until 1945—*not that the Communist Party of the United States did not advocate and teach the overthrow of the United States Government by force and violence* until that date. *That has always been the object and purpose of the party.*

It is further contended by counsel for appellant (App. Br., p. 11) that the power of expulsion or deportation of legally resident settlers cannot legally be equated with the exclusion power.

Again in the Harisiades case, we find this resume of the law in the footnote at page 588 (342 U.S. 580):

> "An open door to the immigrant was the early federal policy. It began to close in 1884 when Orientals were excluded, 23 Stat. 115.
>
> Thereafter, Congress has intermittently added to the excluded classes and as rejections at the border multiplied illegal entries increased.

To combat these, recourse was had to deportation in the Act of 1891, 26 Stat. 1086. However, that Act could be applied to an illegal entrant only within one year after his entry. Although that time limitation was subsequently extended, 32 Stat. 1218, 34 Stat. 904-905, until the turn of the century expulsion was used only as an auxiliary remedy to enforce exclusion.

Congress, in 1907, provided for deportation of legally resident aliens, but the statute reached only women found engaging in prostitution, and deportation proceedings were authorized within three years after entry.

From those early steps, the policy has been extended. In 1910 new classes of resident aliens were listed for deportation, including for the first time political offenders, such as anarchists and those believing in or advocating the overthrow of the Government by force and violence, 36 Stat. 264. In 1917, aliens who were found after entry to be advocating anarchist doctrines or overthrow of the Government by force and violence were made subject to deportation, a five-year time limit being retained, 39 Stat. 889. A year later, deportability because of membership in described subversive organizations was introduced, 40 Stat. 1012, 48 Stat. 1008."

Counsel argues (App. Br. p. 11) that the ultimate question in this case, as in *Harisiades v. Shaughnessy*, 342 U.S. 580, is whether the United States constitutionally may deport a legally resident alien because of alleged membership in the Communist Party which terminated before the enactment of the Alien Registration Act of 1940 (54 Stat. 670, 8 U.S.C. § 137).

It is said to be an admitted fact that appellant came to the United States December 26, 1922 as a permanent settler, and has always intended and attempted to become a United States citizen. Thirty years residence without taking up the obligation of citizenship is a considerable space of time.

The further claim of basic difference between this case and the Harisiades case, it is said is that Harisiades did not question a finding which was approved by the District Court, that the Communist Party during the time he was a member (which commenced in 1945) taught and advocated the overthrow of the Government of the United States by force and violence.

Appellant, as we understand it, has waived this question, and, confined her appeal entirely to the two legal points stated in her brief. In any event, here as in the Harisiades case the Examiner's finding, approved by the court, was:

> "That the Communist Party of the United States during the period of respondent's membership therein was an organization that believed in, advised, advocated and taught the overthrow by force and violence of the Government of the United States."
>
> (Finding V, Ex. "A").

and in Assistant Commissioner's Finding IV (Ex. A)

> "That during the period of respondent's membership therein, the Communist Party of the United States of America advocated and taught the overthrow by force and violence of the Government of the United States."

In effect, what counsel wants this court to do is overrule the United States Supreme Court.

It is further argued that the true reason why the expost facto provision was not held to apply to early deportation cases, points up the fundamental difference between expulsion and exclusion. This is hardly correct. In *Bridges v. Wixon*, 144 F. (2d) 927, (reversed on other grounds, 326 U.S. 125) it was said:

> "The constitutional prohibition against 'expost facto laws' applies only to 'criminal proceedings' and therefore does not apply to proceedings for deportation of alien as member of or affiliated with a subversive organization."

In *Carlson v. Landon*, 343 U.S. 988, in the footnote the court said:

> "The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no re-examination * * * So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary powers of Congress to expel them under the sovereign right to determine what non-citizens shall be permitted to remain within our borders."

In *Harisiades v. Shaughnessy*, 343 U.S. 936, the

language of the Statute prior to its amendment by the Internal Security Act of 1950 is considered. In considering the claim that the actual conflict with Article I Section 9 of the Constitution forbidding *expost facto* enactments, the court pointed out that during all of the years since 1920, Congress has maintained a standing admonition to aliens on pain of deportation not to become members of any organization that advocates the overthrow of the United States by force and violence and, categorically, repeatedly held that to include the Communist Party.

## CONCLUSION

There concededly being no question of fact involved on this appeal and the legal questions raised having heretofore been decided adversely to appellant's contentions, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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*United States Attorney*

JOHN E. BELCHER,
*Assistant United States Attorney*

# United States Court of Appeals

## For the Ninth Circuit

| | |
|---|---|
| HAZEL ANNA WOLF, *Appellant*,<br>vs.<br>JOHN P. BOYD, District Director, Immigration and Naturalization, *Appellee.* | No. 13,870 |
| GEORGE LUCKMAN, *Appellant*,<br>vs.<br>JOHN P. BOYD, District Director, Immigration and Naturalization, *Appellee.* | No. 13,871 |

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

## APPELLANTS' PETITION FOR REHEARING

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## APPELLANTS' PETITION FOR REHEARING

### PRELIMINARY STATEMENT

The petitions for rehearing in each of the above entitled cases are consolidated, since they are consolidated in the opinion of the Court. The Court rightly observed that the specifications of error were identical and that in all other respects the facts of the cases were the same. For the purpose of these petitions this is substantially true. Accordingly, these petitions are consolidated.

### THE COURT'S STATEMENT OF THE FACTS

The Court has correctly stated the facts in each of the cases. In fact, it must be conceded for purposes of the Court's decision all of the relevant facts were stated. However, from the standpoint of appellants'

argument the most basic fact was omitted, namely, that each of the appellants had cut all ties with foreign countries and since their settlement in the United States there is not one syllable of evidence inconsistent with their repeated efforts to become citizens of the United States.

The only basic factual difference in the cases as presented is that Mr. Luckman was born in a now nonexistent country — The Austrian-Hungarian Empire. This fact merely highlights and makes positive a fact which exists in both of the cases, namely, that neither Mrs. Wolf nor Mr. Luckman had perpetuated "a dual status as an American inhabitant but foreign citizen." and that "as an alien, * * * retains a claim upon the state of his citizenship to diplomatic intervention * * *" (*Harisiades v. Shaughnessy*, 342 U.S. 580). Obviously this cannot be true of Mr. Luckman whose country of origin has long ceased to exist. The important point that appellants desire to emphasize is that neither of them has any foreign loyalty as is demonstrated by their long and continued residence and continuing efforts to become citizens of the United States and, it may be added, they might well finally succeed in this endeavor, save only for this proceeding pending against them.

Indeed, it is common knowledge, of which the Court may take judicial notice, that Mr. Luckman cannot actually be deported. To date many persons who have been ordered deported have not been deported because the country of their origin is no longer in existence, or the country of their origin, however defined, refuses to accept them. Thus, the fate of Mr. Luckman is un-

known unless Congress, unchecked by the Constitution as interpreted by the courts, and carrying through with its view that its power over non-citizens is plenary, has other and more cruel plans for persons who "joined a political party that * * * the Nation then recognized as perfectly legal" (Justice Black, dissenting in *Galvan v. Press*, 347 U.S. 522).

## ARGUMENT

**1. The Court was in error in wholly failing to consider appellants' first assignment of error by stating that "there was no attempt to base an order of deportation upon a mere finding of Communist Party membership without a finding that such party was an organization that advocated and taught the overthrow of the government of the United States by force and violence."**

The Court by-passed appellants' first assignment of error by an assertion completely at variance with the quoted conclusion of the trial court that: "Past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien pursuant to the provisions of 8 U.S.C.A. §137 as it existed prior to amendment of said section by Sec. 22 of Internal Security Act of 1950."

As the opinion shows, the Court did this knowingly, and justified its statement that there was no attempt to base an order of deportation upon a "mere finding of Communist Party membership" by stating that the lower court had specifically referred to and recited the administrative findings which did aver that at the time in question such party did advocate and teach the

overthrow of the United States government by force and violence.

Reference to the findings of fact show that any mention of the Communist Party as being an organization that at the time in question advocated the overthrow of the government by force and violence merely referred to the charges and findings in the administrative process. The reference to those charges, together with the flat assertion of the Court that past membership in the Communist Party is as a matter of law a sufficient grounds for deportation of an alien pursuant to the provisions of 8 U.S.C.A. §137, was designed to, and does, make clear that the Court did not agree that the Communist Party did so advocate at the time in question.

This matter is important, because actually it is only in more recent years that the government has contended in legislative enactments that the Party was a conspiracy to overthrow the government of the United States by force and violence. As pointed out in appellants' briefs, Judge Lindberg did not believe that the organization to which appellants had been found to belong advocated such overthrow. As the record before the Court will show the very same witnesses who testified that the appellants were members of the Communist Party, also testified that the organization that appellants had joined did not advocate the overthrow of the government by force and violence. These were the government's own witnesses. The testimony concerning advocacy of overthrow was given by two witnesses who were totally unknown by the appellants, and their testimony contained intrinsic evidence of

untrustworthiness to the degree that it convinced Judge Lindberg that unless membership in the Communist Party as such was a ground for deportation, the appellants were not deportable. The Court made its specific conclusion of law for the purpose of providing this issue on appeal. It is difficult to ascertain how the Court could have stated more clearly that it believed that membership alone during the years 1937 or 1938 could constitute a ground for deportation. The lower court was obviously seriously concerned with whether or not persons were deportable for membership in an innocent organization, that is, at least innocent and legal at the time of membership. The Court was also concerned and it is submitted, rightly so, with the question of whether or not persons could be deported under a law, whether it be the Internal Security Act of 1950, 64 Stat. §987, or the Immigration and Nationality Act of 1952, 66 Stat. §163, 8 U.S.C. 1251, without the right of the individual to have his full day in court which includes a right of challenge to the constitutionality of the law involved and other legal arguments as to the applicability of such statutes.

By way of example, and without making any full or extended argument, it would appear to be extremely doubtful that in passing the Internal Security Act of 1950, or the Immigration and Nationality Act of 1952, and therein providing that past membership in the Communist Party constitutes a ground for deportation, that Congress intended the deportation of such persons as appellants, Wolf and Luckman. First, these acts speak as of the time they were written in characterizing the Communist Party as an organization

advocating the overthrow of the government by force and violence. Second, the government's own witnesses in these cases testified that appellants did not belong to an organization advocating the overthrow of the government by force and violence. Third, it is well known that many organizations have existed bearing one or more similarities to the Communist Party of the United States as presently constituted, including the word "Communist" in the name. They were different organizations. Since 1937 or 1938 it must be conceded that the organization to which appellants are alleged to belong, ceased to exist and that a new organization, the Communist Political Association, was formed, and the government alleges that in 1945 certain of the leaders of the Communist Political Association conspired among themselves to form the Communist Party of the United States for the purpose of advocating the overthrow of the government of the United States in the future. See *Dennis v. United States*, 341 U.S. 494.

Since appellants were defending themselves on a charge that they had joined an organization that advocated the overthrow of the government by force and violence, and since upon judicial review in the district court it was found that it had not been established that they had joined an organization advocating the overthrow of the government by force and violence, the charges against them should be dismissed.

If the government then contends that appellants are deportable on some other ground, it may lodge new charges against them at which time appellants can present both evidence and law that they are not deportable.

**2. The case of *Galvan v. Press*, 347 U.S. 522, does not dispose of the other issues raised by appellants.**

The Court dismisses all other arguments of appellants by reliance upon *Harisiades v. Shaughnessy*, 342 U.S. 580, and *Galvan v. Press*. With reference to the *Galvan* case there can be no question but that his admitted membership in the Communist Party referred to the same organization described in *Dennis v. United States* (*supra*) 341 U.S. 494. The Court's opinion in the *Galvan* case makes clear that it considers the Communist Party as discussed therein advocated the overthrow of the government by force and violence. It does this by discussing whether or not Galvan was fully conscious of this fact. As pointed out in Point 1, and as relied upon there, we contend that the organization with which appellants are alleged to have been associated, did not as testified to by the government's own witnesses, ever believe in or advocate the overthrow of the government by force and violence.

The *Galvan* case (*supra*) concerned the validity of the Internal Security Act of 1950 and, in effect, the Court summarily dismissed all challenges to its constitutionality under the due process clause and the *ex poste facto* clause. By reference to the *Harisiades* (*supra*) case and by citing *Bugajewitz v. Adams*, 228 U.S. 585, 33 S.Ct. 607, 57 L.ed. 978, and *Ng Fung Ho v. White*, 259 U.S. 276, 280, 42 S.Ct. 492, 493, 66 L.ed. 938, the Supreme Court dismissed all constitutional arguments, including certain of the arguments raised by appellants herein. It is submitted, however, that appellants herein have raised a legal point not previously presented to the Supreme Court and one that is entitled

to consideration upon its own merits rather than by the citing of the case which did not include the argument. Also it must be stressed again that *Galvan* did not raise the point relied upon by appellants, that he had cut all ties with any foreign country and had attempted to become a citizen of the United States. In fact, as the opinion shows, Galvan purposely refrained from citizenship because of his recent membership in the Communist Party. As the opinion also shows, Galvan made several trips to his native country, thereby maintaining contact therewith.

As pointed out in the opening briefs, in the *Harisiades* case, and this is also true in the *Galvan* case, such facts become important because an alien "leaves outstanding a foreign call on his loyalties." Appellants in this case have no allegiance to a foreign country and have not left outstanding a foreign call on their loyalty. In fact, it might be said they are not aliens because it is submitted that the mere fact of noncitizenship does not prove a foreign attachment. Such persons have been referred to as denizens, or as settlers. See Boudin, "The Settler Within Our Gates," 26 New York University Law Review, 266.

The *Bugajewitz* (*supra*) and the *Ng Fung Ho* (*supra*) cases cited by the Court in the *Galvan* case are not precedents for the arguments that are presented by appellants herein. The *Ng Fung Ho* case was concerned with proof of lawful entry and further involved a claim of United States citizenship in which the Court held he was entitled to a judicial hearing as to that issue. The *Bugajewitz* case involved a charge

that the alien was a prostitute when she entered and that she was found in a house of prostitution within three years after entry. The case was discussed in appellants' brief, and as we therein pointed out, is consistent with appellants' contention that deportation is an incident of exclusion in which deportation is based upon the violation of a condition imposed as a prerequisite to that continued residence.

Justice Jackson in the *Galvan* case indicates sympathy for the position of Galvan but concludes that the weight of authority is overwhelming, and indicates that he must bow to such precedents because "we are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution * * *." The truth is that there is no precedent until *Harisiades* and *Galvan*, both distinguishable on the basis of the foreign loyalty argument, that holds that a person who made a legal entry as an immigrant and as a settler within the United States and who has violated no conditions imposed as a basis for such continued residence, can be deported.

Appellants submit that they are entitled to a discussion at least of the arguments made in their opening brief in order that the courts and everyone concerned may understand the true basis of the decision. It is difficult to believe that either Congress or the courts intend that innocent persons with no foreign loyalties and with no loyalty to any country except the United States, can be deported as a result of such innocent acts.

Appellants submit that the Court would do a great service and one well within its duty if it would re-examine and permit rehearing in the above entitled cases bearing in mind that constitutional principles are always open for re-examination. The rule of *stare decisis* does not apply.

Respectfully submitted,

C. T. HATTEN,
*Attorney for Appellants.*

No. 13871

# United States Court of Appeals
## For the Ninth Circuit

GEORGE LUCKMAN, *Appellant,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization, *Respondent.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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# United States Court of Appeals
## For the Ninth Circuit

| | |
|---|---|
| GEORGE LUCKMAN, *Appellant,* vs. JOHN P. BOYD, District Director, Immigration and Naturalization, *Respondent.* | No. 13871 |

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

## BRIEF FOR APPELLANT

### JURISDICTIONAL STATEMENT

**A. Statutory provisions believed to sustain jurisdiction.**

Jurisdiction of the District Court was invoked under the provisions of Title 28, U.S.C. §2241, 62 Stat. 964, as amended, particularly as follows:

> "(a) Writs of habeas corpus may be granted by * * * district courts * * * within their respective jurisdictions. * * *
>
> "(c) The writ shall not extend to a prisoner unless—he is in custody under or by color of authority of the United States. * * * "

Jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under the provisions of Title 28,

U.S.C. §2253, 62 Stat. 967, as amended, particularly as follows:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. * * * "

**B. Statutes, the validity of which is involved.**

8 U.S.C. 137 (c), (d), (e) and (g)—Act of October 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673):

> "Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * *
>
> "(c) Aliens who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or all forms of law * * * .
>
> "(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d)
>
> * * *
>
> "(g) Any alien who was at the time of entering the United States or has been at any time there-

after, a member of any one of the classes of aliens enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * * .

**C. References to pleadings showing existence of Jurisdiction**

Appellant's "Petition for Writ of Habeas Corpus * * * " (R. 1 & 2) states the statutory and factual basis of jurisdiction in that petitioner was in custody under color of authority of the United States, and Respondent conceded that the court had jurisdiction (R. 12).

## CONCISE STATEMENT OF THE CASE

In view of the fact that appellant intends to urge errors of law, on admitted facts, it is sufficient to refer to the admitted pleadings as shown by respondent's return to show the questions involved, and the manner in which they are raised.

Appellant is a permanent resident of Seattle, King County Washington, and has resided continuously in the United States of America since June 15, 1907; that he was prior to entry a native of Austria-Hungary and entered the United States for permanent residence; and has at all times thereafter intended and attempted to become a United States citizen (R. 3, 12).

That thereafter appellant was arrested by respondent and deportation hearings were held looking toward the deportation from the United States of appellant under the provisions of the Act of October 16, 1918, as amended (8 U.S.C. §137) but prior to the amendment

of said Act by the Internal Security Act of 1950 (8 U.S.C. §137) (R. 22).

That following a hearing the Assistant Commissioner, Adjudications Division, Department of Justice, Immigration and Naturalization Service, adopted the recommended order and decision of the Hearing Officer "that respondent was during 1937 and/or 1938 a member of an organization that advocated and taught the overthrow, by force and violence, of the government of the United States," and concluded, as a matter of law, that under the Act of October 16, 1918, as amended, the respondent is subject to deportation (R. 26).

Upon exhausting administrative remedies by appeal to the Board of Immigration Appeals, the appeal was dismissed and respondent directed appellant to produce himself for deportation from the United States, whereupon the within action was instituted in Federal District Court (R. 27).

The court thereupon ruled as a matter of law, and thereby presented the issues now raised on appeal, as follows:

(1) Past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien pursuant to the provisions of 8 U.S.C. 137 as it existed prior to amendment of said action by Section 22 of the Internal Security Act of 1950 (Public Law 831, 81st Congress, 2nd Session, 64 Stat. 1006) (R. 20).

(2) The Act of October 16, 1918, as amended by the Act of June 28, 1940 (8 U.S.C. 137) providing for de-

portation of non-citizens who, after entry, became members of an organization which has thereafter been found by Congress to be an organization which advocates the overthrow of the government of the United States by force or violence is not unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth amendment, and the *ex post facto* prohibitions of Article I, Section 9, Clause 3 of the Constitution of the United States (R. 29, 30. Conclusions of Law).

## SPECIFICATION OF ERRORS

A. The district court erred in concluding that past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of a non-citizen pursuant to the provisions of 8 U.S.C.A. §137 as it existed prior to amendment of said section by section 22 of the Internal Security Act of 1950.

B. The court erred in concluding that "The Act of October 16, 1918, as amended by The Act of June 28, 1940 (8 U.S.C. §137) providing for deportation of aliens who, after entry, became members of an organization which advocates the overthrow of the Government of the United States by force or violence is not unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth Amendment, and the *ex post facto* prohibitions of Article I, Section 9, Clause 3 of the Constitution of the United States.

## SUMMARY OF ARGUMENT

**A. Membership in the Communist party prior to the Internal Security Act of 1950 was not alone a ground for deportation.**

Under the statute upon which the proceedings were based, the order of deportation having been based upon 8 U.S.C. §137 as it existed prior to the amendment of said section by Section 22 of the Internal Security Act of 1950, mere past membership in the Communist Party was not, as a matter of law, a sufficient ground for deportation, but the statute required proof that the non-citizen had been a member of an organization that advocated and taught the overthrow of the government of the United States by force and violence.

The court based this decision on the case of *Martinez v. Neelly,* 197 F.(2d) 462, affirmed by a four to four decision of the U. S. Supreme Court, 97 L.ed. (Advance p. 275).

It is submitted that the *Martinez* case was wrongly decided in that it based its decision on the Internal Security Act of 1950 without any opportunity for a challenge to the constitutionality of the Internal Security Act of 1950, and without argument thereon.

In thus deciding this case the court avoids, and thereby virtually concedes a failure to prove that appellant had at one time belonged to an organization which was proscribed under the statute under which the government proceeded by warrant against appellant, and based its decision upon a statute which appellant had no opportunity to attack. This failure to permit appellant to be heard denies due process.

The Internal Security Act of 1950 (Subversive Activities Control Act of 1950, Section 22 (Public Law 831, 81st Congress, 2nd Session, 64 Stat. 1006, 8 U.S.C. §137), is not involved in any way in these proceedings because the warrant of arrest and proceedings held thereunder, and from which review is sought, were not based on that Act.

**B. Deportation cannot constitutionally be ordered for the alleged commission of an act which Congress had not proscribed at the time the act is alleged to have been committed, and cannot constitutionally be ordered of one who came to the United States as a permanent resident and settler in 1907 and has never violated the conditions then established for his continued residence therein.**

Deportation for the alleged commission of an act which Congress did not impose as a condition to a continuation of "permanent" residence in the United States at the time the non-citizen established such "permanent" residence in 1907 is *either* a denial of substantive due process and completely without the constitutional power of Congress *or* it is in violation of the First Amendment, and the *ex post facto* prohibitions of Article I, Section 9, of the Constitution of the United States. See: "The Settler Within Our Gates," 26 New York University Law Review No. 2, 3, & 4, and "Deportation as a Denial of Substantive Due Process," by Stimson Bullitt, 28 Washington Law Review, No. 3, 205.

Appellant is being expelled for membership in the Communist Party "in 1938 and/or 1939." Member-

ship, as such, did not subject a non-citizen or alien to expulsion until the passage of the Internal Security Act of 1950, 64 Stat. 1008. It was not an expellable act at the time of appellant's alleged membership, and it certainly was not an expellable act at the time of appellant's arrival in the United States in 1907, and the non-membership in the Communist Party was never made a condition for his continued residence in the United States.

As will be shown by the argument hereafter, prior cases have *assumed* that the power to deport an alien is absolute, and that Congress could order the deportation of all aliens on *any* ground. The substantive due process issue here raised was not raised and considered in any of the leading arguments, save possibly in *Harisiades v. Shaughnessy,* 345 U.S. 580, and the case is distinguishable from the one at bar.

Likewise, the courts prior rulings, giving priority over the assumed right or power to expel over the express guarantee of the Fifth Amendment, and the prohibition against *ex post facto* laws have always been demonstrably based upon *dicta* contained in the Chinese Exclusion case (*Chae Chan Ping v. United States,* 130 U.S. 581 (1889) and *Fong Yue Ting v. U. S.,* 149 U.S. 697 (1893) and subsequent cases prior to *Harisiades* (*supra*) also do not represent actual holdings.

Similarly, because the leading cases were not concerned with the power to deport settlers legally and permanently resident in the United States, and were actually concerned with the power "to exclude," little thought, if any, was given to the fact that the

court was giving priority to an assumed right to deport, which was in turn based upon the right to exclude, and this power was forming the basis for overriding the express guarantees of the Constitution.

## ARGUMENT

**I. The court cannot legally assume that membership in the Communist Party in 1938 and/or 1939 alone can support a deportation order based upon the Internal Security Act of 1950 when appellant is not given an opportunity to attack the constitutionality of that act.**

Appellant was ordered deported by the Assistant Commissioner for Adjudications, Department of Justice, Immigration and Naturalization Service for alleged membership in 1938 and/or 1939 in an organization alleged to advocate the overthrow of the Government of the United States by force and violence (R. 18).

Appellant argued in the administrative hearing (Respondent's Exhibit A) and in the District Court that he was not a member of an organization advocating the overthrow of the government by force and violence.

*Kessler v. Strecker,* 307 U.S. 22, 30, 31, 83 L.ed. 1082, 1088 decided April 17, 1939 and *Dennis v. United States,* 341 U.S. 494, 95 L.ed. 1137 both support appellant's position that the Communist Party did not advocate the overthrow of the government in 1938 or 1939, since the *Dennis* case points out that the government contended a conspiracy to overthrow the government of the United States by certain named defendants did not commence until 1945.

Appellant also argued that only two of the government's witnesses, Paul Crouch and John Leech (Respondent's Exhibit A) submitted any testimony on this issue, and the witnesses who believed appellant to have been a member based upon their own alleged membership denied that the Communist Party so advocated.

To avoid ruling on this question the court ruled that mere membership in the Communist Party in 1938 or 1939 was, as a matter of law, ground for deportation, and based this decision on *Martinez v. Neelly,* 197 F.(2d) 462 (affirmed by a four to four decision of the Supreme Court on January 12, 1953 in 97 L.ed. .... (Advance p. 275).

Appellant submits that due process required that he be given the opportunity to attack at the outset the constitutionality of any act which is being used as a legal ground for ordering his deportation, and that the court by following the *Martinez* case (*supra*) denied him due process of law, and in fact conceded that the government had failed to prove deportability under the act as it existed during his hearing, namely, under 8 U.S.C. §137 wherein proof that the named organization was one which did in fact advocate the overthrow of the government by force and violence was required.

**II. The power of expulsion or deportation of legally resident settlers cannot legally be equated with the exclusion power, and the United States Supreme Court has never held, in other than dicta, to the contrary.**

The ultimate question in this case, as in *Harisiades v. Shaughnessy,* 342 U.S. 716, is whether the United States constitutionally may deport a legally resident alien because of alleged membership in the Communist Party which terminated before enactment of the Alien Registration Act of 1940 (54 Stat. 670, 8 U.S.C. §137).

There are two basic and significant factual differences. First, it is admitted that appellant came to the United States on June 15, 1907 as a permanent settler, and he has at all times herein mentioned intended and attempted to become a United States citizen (R. 3, 12). Second, he was born in Austria-Hungary, a country which no longer exists, in a city which is now a part of Yugoslavia, a new country born during the First World War after appellant had been gone from the place of his birth more than a decade, and a place torn by interminable strife during the entire period of the Second World War while under invasion from Nazi Germany, and a country now ruled by one who avows that he is a Communist, and is engaged in bitter strife with other European countries whose governments also proclaim their belief in the theories of Communism. Therefore, appellant has no foreign allegiance to evoke, and he has by efforts to become a citizen of the United States acknowledged his allegiance to the country in which he has lived for virtually his entire life.

A third basic difference pertains to the fact that *Harisiades* did not question a finding which was approved by the District Court, that the Communist Party during the time he was a member (which commenced in 1925), taught and advocated the overthrow of the Government of the United States by force and violence.

The *Harisiades* case (*supra*) in effect, held that the power of Congress to expel non-citizens was as broad as the power to exclude aliens in the first instance. In justification of this rule the court relied upon past decisions of the court (See Note 11) none of which are in point, and in discussing the matter, stated that Harisiades had perpetuated "a dual status as an American inhabitant but foreign citizen" and that "as an alien, he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf." The court continued to develop the distinction by stating that Harisiades "by withholding his allegiance from the United States * * * leaves outstanding a foreign call on his loyalties which international law not only permits our government to recognize but commands it to respect."

These statements do not square with the facts in this case. However, in addition we advert to the legal authority for the court's position that expulsion is based on authority or power inherent in every sovereign state, and that it is a weapon of "defense and reprisal."

Congressional power in immigration matters stems primarily from Article I, §8, Clause 2, of the Constitution which delegates to Congress the power "To regu-

late Commerce with foreign Nations;" and it is also said to be based upon national sovereignty.

Importation of goods is called commerce; importation of persons is a type of commerce called immigration. Constitutionally, however, the same power is involved. (cf. *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304.) Thus in the *Chinese Exclusion Case* (1889) 130 U.S. 581, and *Nishimura Ekiu v. United States* (1892) 142 U.S. 651 it was decided that the power to exclude arises from the very nature of immigration, and in the *Ekiu* case (*supra*) relied upon the case of *Hilton v. Merritt* (1884) 110 U.S. 97, which involved the importation of goods, and thus illustrates the recognized constitutional interconnection between the importation of goods, and the immigration of persons.

When the power of the government to deport is considered there is no express power, and by the terms of the Constitution persons who are legally resident in the United States are entitled to the substantive freedoms guaranteed in the Bill of Rights (See *Bridges v. Wixon,* 326 U.S. 135, 160). We submit that this is the fact, despite *dicta* to the contrary which, in fact, would maintain that every non-citizen may constitutionally be deported for whatever reason it may choose, limited only by the due process requirement of a fair hearing.

However, appellant submits that Congress in passing the Immigration and Nationality Act of 1952, 66 Stat. 163 (1952) 8 U.S.C. §§1101 *et seq.* (Supp. 1953) commonly known as the McCarran-Walter Act, denied the latter position in so many words, as follows:

> "The power of Congress to control *immigration* stems from the sovereign authority of the United States as a nation and from the constitutional power of Congress to *regulate commerce* with foreign nations. Every sovereign nation has power, inherent in sovereignty and essential to self-preservation, to forbid entrance of foreigners within its dominions, or to *admit them* only in such cases and *upon such conditions as it may see fit to prescribe.* Congress may exclude aliens altogether or *prescribe terms and conditions upon which they may come into or remain* in this country."
>
> House Report No. 1513, March 13, 1952, p. 5. (Emphasis supplied)

The first case decided by the Supreme Court that involved deportation rather than entry, expulsion because of illegal entry, or proof of lawful entry, was *Zakonaite v. Wolf* (1912) 226 U.S. 272 (For a discussion of all prior leading cases see Boudin, "The Settler Within Our Gates, 26 N.Y. U.L.Q., 266-290, 451-474, 634-662).

This case involved the Act of 1907, 34 Stat. 900, which provided that:

> " * * * any alien woman * * * who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years, after she shall have entered the United States, *shall be deemed* to be unlawfully within the United States and shall be deported. * * * "

This could be interpreted as a presumption that the alien had violated a condition precedent, the authority for which is unquestioned, rather than the violation of a condition imposed subsequent to entry.

In this regard the court stated on page 275:

> "It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend. * * * "

In support of this quotation the Court cites seven cases, none of which involved the expulsion of a lawful permanent resident alien. The second case cited is *United States v. Zucker* (1896) 161 U.S. 475, which did not involve immigration, but upheld a subsequent forfeiture of goods that had been allowed entry because of fraudulent concealment of their value *at the time of entry.*

Thus it is clear that the power to expel is based properly upon the power to exclude, and is only understandable when it is related to that power, in that effective exercise of the power to exclude requires the auxiliary power to deport aliens who had recently and illegally entered.

The difference between deportation and exclusion was clearly stated by Justice Holmes in *Chin Yow v. United States* (1908) 208 U.S. 8, 12 relating to a man excluded as an alien, and who was denied a hearing to pass upon his claim of citizenship, as follows:

> "It would be difficult to say that he was not imprisoned, theoretically, as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply pre-

vented from going in one direction that he desired and had a right to take. * * * ''

Deportation of a settled resident is clearly far more than exclusion, and, although the whole includes all of its parts, it is still true that a part does not include the whole. Similarly, the power to exclude does not carry with it the much greater power, from the standpoint of the non-citizen, of deportation without any protection under the Constitution save procedural due process. (See Dissenting opinion of Mr. Justice Douglas in *Harisiades v. Shaughnessy, supra*).

Further, the true reason why the *ex post facto* provision was not held to apply to early deportation cases points up the fundamental difference between expulsion and exclusion. Thus the case of *Bugajewitz v. Adams* (1913) 228 U.S. 585, involved the expulsion of a woman found in a house of prostitution, and was brought pursuant to the provisions of the Act of 1910, 36 Stat. 265, which eliminated a three year limitation under the 1907 Act. The deportation order was contested upon the constitutional ground that this was an *ex post facto* law, and upon the ground that the Act deprived the alien of her rights to jury trial, etc. Justice Holmes dealt with the *ex post facto* argument by saying:

> '' * * * The prohibition of *ex post facto* laws * * * has no application * * * and with regard to the petition, it is not necessary to construe the statute as having any retrospective effect.'' (at p. 591).

This has meaning because, since the Act of 1903, 32 Stat. 1213, which was in effect in 1905 when the alien

entered the United States, provided for the expulsion of prostitutes, and since the 1910 act struck out the three year statute of limitations and thereby rendered the alien subject to expulsion, it must necessarily have inferred that she could have been expelled or have been excluded at the threshhold under the then existing law for being a prostitute. Otherwise the statement that it is unnecessary to construe the statute as having any retrospective effect is meaningless, or patently false.

Further there was no pretense that after a five year stay, with no family, and her criminal activity while here she had become a rooted settler.

As has been pointed out above, and discussed fully in the Boudin article, 26 New York University Law Quarterly 266-290, 451-474, 634-662 (*supra*) and the Bullitt article in 28 Washington Law Review 205, 217 (*supra*) the reason for the uniform *dicta* in the prior cases have been the "imaginary precedents" of *The Chinese Exclusion* and *Fong Yue Ting* cases (*supra*) and the *dicta* of later cases which were based upon the former, and the reasoning of the *Fong Yue Ting dicta* which if closely examined cannot be persuasive.

To return to the original basis of comparison between commerce and immigration, if unilateral conditions cannot be added to a contract governing property rights, then surely they cannot be imposed upon a status the loss of which deprives one of "all that makes life worth living."

To conclude, it is again submitted that the *implied* authority of deportation cannot be given priority over

the express guarantees of the First, and Fifth Amendents of the United States Constitution, and Article I, Section 9 of the United States Constitution prohibiting *ex post facto* laws. Further, it is submitted that there is no rational basis for the arbitrary preference for the natural born among persons all of whom have acquired roots in the United States as a result of permanent residence, and therefore this class discrimination is a denial to deep-rooted aliens of the equal protection of our laws. Bullitt, Due Process in Deportation, 29 Washington Law Review 219.

As stated in the above cited article:

> " * * * the extension of the 1st Amendment to limit state power is a more drastic step than to read the Equal Protection clause into the Due Process clause of the 5th. By the latter, the United States would restrict its own powers and tend to harmonize its amendments. The 14th Amendment authorizes Congress to enact legislation to enforce the prohibition of a state's denial of equal protection. It should follow that it would be inhibited from doing itself what it is expressly authorized to prevent states from doing. The Supreme Court often tests the validity of federal legislation as to discrimination and classification under the Due Process Clause of the 5th Amendment by the same rules of equality that are employed to test the validity of state legislation under the Equal Protection clause of the 14th." (p. 219).
>
> * * *

Also:

> "It has been repeatedly held that despite the absence of an equal protection clause to check Con-

gress, discriminatory Federal legislation may be so arbitrary and injurious as to be invalid as a violation of the Due Process clause." (p. 220).

Since appellant has not violated any condition that Congress can constitutionally impose upon his continued residence in the United States, the order of deportation should be set aside, and appellant should be released from the further custody of the Attorney General.

C. T. HATTEN,
*Attorney for Appellant.*

Dated, Seattle, Washington.
September 24, 1953.

No. 13871

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE LUCKMAN,

*Appellant,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization,

*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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HONORABLE WILLIAM J. LINDBERG, *Judge*

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## BRIEF OF APPELLEE

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

## BRIEF OF APPELLEE

## JUDISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by the provisions of Section 2241, Title 28, U.S.C. and upon this court by the provisions of Section 2253, Title 28, U.S.C.

## STATUTES INVOLVED

Title 8, U.S.C., Section 137 (c) (e) and (g), Act of October 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673), provides:

> "Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * *
>
> (c) Aliens who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or all forms of law * * *.
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, displays, or causes to be written, circulated, distributed, printed, published, or displayed, or has in his possession for the purpose of circulation, distribution, publication, issue or display, any written or printed matter of the character described in paragraph (d).

[Paragraph (d) referred to in paragraph (e) specifies "any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching: (1) the overthrow by force or violence of the Govern-

ment of the United States or of all forms of law."]

* * *

(g) Any alien who was at the time of entering the United States *or has been at any time thereafter*, a member of any one of the classes of aliens enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."

In appellant's "concise statement of the case" it is said:

"In view of the fact that appellant intends to urge *errors of law, on admitted facts*, it is sufficient to refer to the admitted pleadings as shown by respondent's return to show the questions involved, and the manner in which they are raised." (Italics ours)

This statement coupled with the "specification of errors" (Br. p. 5) shows that this appeal raises only two legal questions, as follows:

A. Whether past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien under the provisions of Title 8, Section 137, U.S.C., as it existed prior to amendment by Section 22 of the Internal Security Act of 1950.

B. Whether the Act of June 28, 1940 (8 U.S.C. § 137) providing for deportation of aliens who, after entry, became members of an organization which advocates the overthrow of the Government of the United States by force and violence is unconstitutional in violation of the First Amendment, the due process clause

of the Fifth Amendment, and the *ex post facto* prohibitions of Art. I, Section 9, Clause 3 of the Constitution of the United States.

## ARGUMENT

It is our position that all of these questions have been decided by the United States Supreme Court adversely to the contentions of appellant and are no longer in doubt.

The first question, under "A" above was squarely decided by the Supreme Court in the case of *Harisiades v. Shaughnessy*, 342 U.S. 580.

In the syllabus we find:

> "The Alien Registration Act of 1940, so far as it authorizes the deportation of a legally resident alien because of membership in the Communist Party, *even though such membership terminated before enactment of the Act*, was within the power of Congress under the Federal Constitution pp. 581-596."

That case clearly holds:

A. That the Act does not deprive the alien of liberty without due process of law in violation of the Fifth Amendment.

   (1) The power to deport aliens is inherent in every sovereign state.

   (2) The policy toward aliens is so exclusively entrusted to the political branches of the Government as to be largely immune from judicial inquiry or interference;

and it cannot be said that the power has been so unreasonably or harshly exercised by Congress in this Act as to warrant judicial interference.

(3) The fact that the Act inflicts severe hardship on the individuals affected does not render it violative of the Due Process Clause.

B. The Act does not abridge the alien's freedoms of speech and assembly in contravention of the Fifth Amendment.

C. The Act does not contravene the provision of Art. 1, Sec. 9 of the Constitution forbidding *ex post facto* laws.

(1) Procedural requirements of the Administrative Procedure Act are not mandatory as to proceedings which were instituted before the effective date of the Act.

These same questions were considered by this court in *Galvan v. Press*, (Jan. 1953) 201 F. (2d) 302, and again passed upon by the United States Supreme Court, in affirming by a divided court, the case of *Martinez v. Neelly*, 197 F. (2d) 462 (97 L.Ed. Adv. p. 275).

Counsel says the decision in the Martinez case, *supra*, is wrong because it was decided under the Internal Security Act of 1950 without any opportunity for a challenge to the constitutionality of the Internal Security Act of 1950 and without argument thereon.

The court in the case of *Martinez v. Neelly*, 197 F. (2d) 462, said at pp. 465-6:

"Congress by the Act of 1950 (Internal Security Act) expressly provided for the deportation of 'any alien who was at the time of entering the United States, or has been at any time thereafter, a member' of the Communist Party of the United States. Title 8, U.S.C.A. § 137, Pars. (1), (2), (c), (3), and § 137-3. *While we do not rest our opinion upon this recent enactment, it is apparent that plantiff is subject to deportation even though the present order be nullified.* Having admitted membership in such party, the constitutionality of the recent Act would be the only attack open to the plaintiff. However, any hope of success in this respect would appear to be a remote possibility in view of the holding of the Supreme Court in the *Harisiades* case relative to the 1940 amendment. At any rate, it certainly would be immune from any contention that it constituted an *ex post facto* law in violation of Sec. 9 of Article I of the Constitution. *Harisiades*, 342 U.S. at page 594, 72 S.Ct. 512."

The Supreme Court has since decided the constitutionality of the Internal Security Act of 1950 in the recent case of *Heikkila v. Barber*, 345 U.S. 229.

In the instant case the District Court, as in the *Harisiades* case and the *Martinez* case, decided the issues of law as the law stood prior to the enactment of the Internal Securities Act, and it would seem unnecessary to discuss the matter further, other than to say that petitions for rehearing were filed in the United States Supreme Court in the *Harisiades* case and denied 343 U.S. 936.

In the instant case the Examiner's Finding V (Ex. A) was as follows:

> "That the Communist Party of the United States during the period of the respondent's membership therein was an organization that believed in, advised, advocated and taught the overthrow by force and violence of the Government of the United States."

This finding and the finding of the Assistant Commissioners approved by the District Court was based on "substantial evidence" (R. 27, Finding VIII, R-37, Dist. Ct. memo op.).

Much argument is made in criticism of the decisions of the Supreme Court set out herein and upon which the district court's decision in this case is based, but that argument should be addressed to the Supreme Court rather than to this court.

## CONCLUSION

It is respectfully submitted that all questions raised on this appeal have been definitely decided adversely to appellant's contentions and the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
*United States Attorney*

JOHN E. BELCHER
*Assistant United States Attorney*

No. 13876

# United States
# Court of Appeals
## for the Ninth Circuit.

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In the Matter of:
The Imprisonment of FRANK J. KELLNER,

FRANK J. KELLNER,

Appellant.

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# Transcript of Record

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**Appeal from the District Court
for the Territory of Alaska,
Third Division**



Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-7-53

No. 13876

# United States
# Court of Appeals
## for the Ninth Circuit.

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In the Matter of:
The Imprisonment of FRANK J. KELLNER,

FRANK J. KELLNER,

Appellant.

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**Appeal from the District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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## NAMES AND ADDRESSES OF ATTORNEYS

JOHN D. SHAW,
Anchorage, Alaska,
Attorney for Petitioner.

J. EARL COOPER,
United States Attorney,
Anchorage, Alaska,
Attorney for the United States.

In the District Court for the Territory of Alaska, Division Number Three, at Anchorage

No. A-7424

In the Matter of:
The Imprisonment of FRANK J. KELLNER.

## PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Anthony J. Dimond, Judge of the District Court of the Third Judicial Division of the Territory of Alaska:

The Petition of John D. Shaw, on behalf of Frank J. Kellner, respectfully shows:

I.

That the said Frank J. Kellner is imprisoned and restrained of his liberty at the Federal Jail in the City of Seward, Territory of Alaska, by Irwin Metcalf, Deputy United States Marshal.

II.

That the said Frank J. Kellner is improperly imprisoned and restrained and not by virtue of the legal judgment or decree of a competent tribunal of civil or criminal jurisdiction and not by virtue of an execution regularly and lawfully issued upon such judgment or decree.

III.

That the cause or pretense of said imprisonment and restraint according to the best knowledge and belief of the petitioner is as follows:

That said Frank J. Kellner was arrested at Ugashik, Alaska, on Saturday, July 28, 1951, by Herbert D. Hoff, Deputy United States Marshal, on complaint by Annie Kellner, wife of the said Frank J. Kellner, charging him, the said Frank J. Kellner, with Assault and Battery, and Drunk and Disorderly Conduct. A copy of the warrant of arrest is attached hereto.

The trial on the aforementioned charges was held at Naknek, Alaska, before United States Commissioner Kathryn Hoff on the following day, viz., Sunday, July 29, 1951, a holiday (A.C.L.A. 1-1-6).

Defendant, the said Frank J. Kellner, pleaded not guilty, was not represented by counsel, and the only witness appearing against him was his wife, the said Annie Kellner.

Whereupon the said Frank J. Kellner was found guilty of the crimes of assault and battery, and drunk and disorderly conduct, and sentenced to jail for 180 days on the first count and 60 days on the second count, a total of 240 days, there being no stipulation that imprisonment on one conviction should commence at the expiration of the imprisonment for the other crime (A.C.L.A. 65-2-7), (A.C.L.A. 65-2-14), (A.C.L.A. 66-16-13), said trial, judgment, sentence and commitment all occurring on Sunday, July 29, 1951.

The said Frank J. Kellner began serving said sentence or sentences, as the case may be, on Sunday, July 29, 1951, in the Federal Jail at Naknek, Alaska; was transferred to the Anchorage Jail on or about October 1st, 1951, and thence to the Fed-

eral Jail at Seward, Alaska. He has been imprisoned at all times under the above-stated sentence or sentences, as the case may be, since Sunday, July 29, 1951. A copy of a certified copy of the order of commitment under which the said United States Marshal, Irwin Metcalf, is presently restraining the said Frank J. Kellner is attached hereto.

The said United States Commissioner, Kathryn Hoff, either through honest mistake or intentionally, as the case may be, caused the said certified copy of the order of commitment to show the date of trial and sentence to be Monday, July 30, 1951, instead of the true date, viz., Sunday, July 29, 1951. The original order of commitment has not been located, but to the best information and belief of petitioner it is locked up with other records of the Court at Naknek, Alaska, and said Court is closed at this season.

IV.

That the said imprisonment and restraint of the said Frank J. Kellner are illegal in this respect: The trial, judgment and sentence occurred on Sunday, a legal holiday, contrary to the law (A.C.L.A. 52-1-6) and by virtue thereof are null and void.

V.

That the legality of the imprisonment and restraint has not been already adjudged upon a prior writ of habeas corpus, to the knowledge or belief of this petitioner.

Wherefore, petitioner prays that a writ of habeas corpus may issue, directed to the said Irwin Met-

calf, commanding him to produce the said Frank J. Kellner, and certify and return therewith the time and cause of his imprisonment and restraint, before the said Court at a time and place therein specified, to do and receive what shall then and there be considered concerning the said Frank J. Kellner; and that he, the said Frank J. Kellner, may be restored to his liberty.

Dated at Anchorage, Alaska, this 26th day of December, 1951.

/s/ JOHN D. SHAW,
Petitioner and Attorney
for Petitioner.

United States of America,
Territory of Alaska—ss.

John D. Shaw, being first duly sworn upon his oath, deposes and says:

That he is the Petitioner above named and the Attorney for Frank J. Kellner; that he has read the foregoing Petition for Writ of Habeas Corpus, knows the contents thereof, and the same is true and correct to the best of his knowledge and as he verily believes.

/s/ JOHN D. SHAW.

Subscribed and sworn to before me this 26th day of December, 1951.

[Seal] /s/ HAROLD J. BUTCHER,
Notary Public in and for
Alaska.

My Commission expires April 21, 1953.

WARRANT
(Misdemeanor)

In the United States Commissioner's Court, Territory of Alaska, Third Division, Koribak Precinct, at Naknek, Alaska.

United States of America,
Territory of Alaska—ss.

The President of the United States of America to the Marshal of the Third Division of the Territory of Alaska, or His Deputy, Greetings:

We Command You to apprehend forthwith Frank Kellner, who is named in a complaint made on oath before me this 28th day of July, A.D. 1951, by Annie Kellner, if he be found in said District, for the crime of Assault and Battery, and Drunk and Disorderly Conduct, as is more particularly set forth in said complaint, and bring him before me to answer said complaint, and be further dealt with as the law directs.

Hereof Fail Not, and make the return of this writ with your doings thereon.

Given under my hand and seal at Naknek, Alaska, this 28th day of July, 1951.

[Seal] /s/ KATHRYN R. HOFF,
United States Commissioner and Ex-Officio Justice of the Peace.

In the Justice Court for the Kvichak Precinct,
Third Division, Territory of Alaska

UNITED STATES OF AMERICA

vs.

FRANK KELLNER.

COMMITMENT

Violation A.C.L.A., 1949, 65-4-23 and 65-10-3

In the Name of the United States of America, to the United States Marshal for the Third Division, Territory of Alaska, or Any Deputy, Greeting:

An order having this day been made by me, that he serve 180 days for Assault and Battery and 60 days for Drunk and Disorderly Conduct, you are therefore commanded to receive him in your custody and detain him until legally discharged, and I have admitted him to bail to answer in the sum of $.....

Dated at Naknek, Alaska, this 30th day of July, 1951.

/s/ KATHRYN R. HOFF,
U. S. Commissioner and Ex-Officio Justice of the Peace.

United States of America,
Territory of Alaska,
Third Division—ss.

I Hereby Certify that I received the within Commitment on the 30th day of July, 1951, and executed

the same on the same day by delivering the foregoing named Defendant to the Jailer at the U. S. Jail at Anchorage, Alaska.

IRWIN L. METCALF,
United States Marshal.

/s/ HERBERT D. HOFF,
Deputy Marshal.

Duly verified.

In the Justice's Court for the Precinct of Kvichak
District of Alaska, Third Division
No. 852

UNITED STATES OF AMERICA

vs.

FRANK KELLNER

CERTIFIED COPY OF JUDGMENT

On the 30th day of July, 1951, the above-named defendant, having been brought before me, Kathryn R. Hoff, a Commissioner and ex-officio Justice of the Peace, in a criminal action, for the crime of Assault and Battery and Drunk and Disorderly Conduct, and the said Frank Kellner having thereupon pleaded "not guilty," and been duly tried by Kathryn R. Hoff, and upon such plea duly convicted, I have adjudged that he be imprisoned in the jail at Naknek, Alaska, 240 days: 180 days for Assault and Battery and 60 days for Drunk and Disorderly.

/s/ KATHRYN R. HOFF,
Commissioner and Ex-Officio
Justice of the Peace.

United States of America,
Territory of Alaska—ss.

I, Kathryn R. Hoff, Commissioner and ex-officio Justice of the Peace, hereby certify the foregoing to be a full, true and correct Copy of the Judgment entered in the above-entitled action.

In Witness Whereof: I have hereunto set my hand and affixed the seal of said Court at Naknek, Alaska, this 30th day of July, 1951.

/s/ KATHRYN R. HOFF,
Commissioner and Ex-Officio
Justice of the Peace.

I hereby certify the above is a true and correct copy of the Certified Copy of Judgment made by me when United States Commissioner.

/s/ KATHRYN R. HOFF.

Duly verified.

[Endorsed]: Filed December 26, 1951.

In the District Court for the Territory of Alaska
Division Number Three at Anchorage

No. A-7424

In the Matter of
The Imprisonment of Frank J. Kellner.

## ORDER FOR WRIT OF HABEAS CORPUS TO ISSUE

Let a writ of habeas corpus issue in pursuance of the prayer of the within petition, returnable before the District Court, Third Division at Anchorage, Territory of Alaska.

Dated this 26 day of December, 1951.

/s/ ANTHONY J. DIMOND,
Judge of the District Court.

[Endorsed]: Filed December 26, 1951.

Entered December 26, 1951.

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[Title of District Court and Cause.]

## WRIT OF HABEAS CORPUS

The United States of America to Irwin Metcalf, Deputy United States Marshal at Seward, Alaska.

You are hereby commanded to produce the person of Frank J. Kellner, by you imprisoned, by whatsoever name he may be called or charged, and certify and return therewith the time and cause of his imprisonment before the Judge of the Dis-

trict Court, Third Division, Territory of Alaska, at Anchorage, Alaska, on the 28th day of December, 1951, at 4:00 p.m. to do and receive what shall then and there be considered concerning the said person imprisoned.

Witness the Honorable Anthony J. Dimond, Judge of the District Court of the Third Division at Anchorage, Territory of Alaska, attested by my hand and seal of said Court this 26th day of December, 1951.

/s/ M. E. S. BRUNELLE,
Clerk of the District Court.

/s/ LOUISE STRAHORN.

Approved 12-26-51.

/s/ ANTHONY J. DIMOND.

Certified true copy.

Return on service of writ attached.

[Endorsed]: Filed December 28, 1951.

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[Title of District Court and Cause.]

## TRANSCRIPT OF EXCERPT OF PROCEEDINGS

On Friday, January 11, 1952, in open court at Anchorage, Alaska, the above-entitled matter came on for hearing before the Honorable Anthony J. Dimond, U. S. District Judge, the Government be-

ing represented by the United States Attorney, J. Earl Cooper, the petitioner being represented by John D. Shaw. At that time the following proceedings were had:

The Court: Giving full weight to all of the testimony and evidence offered by the petitioner, I am convinced beyond any doubt that the trial was held on Monday. Now, we have against that, of course, the testimony of the petitioner, who was not an entirely unbiased witness, and we have the testimony of Mr. Shipley, and the fact that Mr. Shipley said that half of Naknek could be brought here to testify that the trial was held on Sunday did more to discredit his evidence in my mind than anything else. It just doesn't make sense. The trial was had on Monday, and the petitioner knows that, if he hasn't just argued himself into the frame of mind where he believes what is most advantageous for him. Therefore, the proceedings are valid; further, the defendant was rightfully convicted after trial. He was convicted under due process. Now, another, and perhaps more difficult question arises as to whether the sentences imposed run consecutively or concurrently. What the able counsel for petitioner says is correct, that if there is any substantial doubt about it, if there is any way two constructions can be made of the language of the judgment, than that construction ought to be adopted which is most favorable to the defendant, and the sentences should run concurrently in this case. However, I think there is no room for

any such construction. In the certified copy of the judgment, which I presume is a true copy, it is written that the defendant be imprisoned in jail at Naknek 240 days. All one count. There is nothing indefinite about it; it does not say 180 days for one count and 60 days for another. It says 240 days, 180 days for Assault and Battery and 60 days for Drunk and Disorderly. Undoubtedly, it was the intention of the magistrate to have the sentences run consecutively and I think it has been said in such plain language that it would be an abuse of discretion for this Court to set it aside. It is true, the word "consecutively" was not used, and the word "successively" was not used, but we don't undertake to find in courts of jurisdiction such as the Justice's Court, a degree of high learning and careful use of technical language that one might rightfully demand in the District Court in a high court of appeals. The judgment stating that the defendant must be imprisoned for 240 days is the judgment of the Court, and if it stopped right there I presume it would be sufficient; but it didn't stop there, but provided just how that would be—180 days upon conviction of Assault and Battery, and 60 days on conviction of having been Drunk and Disorderly. Therefore, the prisoner is remanded to the custody of the Marshal to complete the term of his imprisonment, and his bail will be returned to him, and a written order will be signed if it is a cash bail. That is all.

United States of America,
Territory of Alaska—ss.

I, Mary Keeney, Official Reporter of the above-entitled court, hereby certify:

That the foregoing is a full, true and correct transcript of the excerpt of proceedings in the above-entitled matter taken by me in shorthand in open court at Anchorage, Alaska, on January 11, 1952, and thereafter transcribed by me.

/s/ MARY KEENEY.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Appellant—Frank J. Kellner, Federal Jail, Seward, Alaska.

Appellant's Attorney—John D. Shaw, Anchorage, Alaska.

Appeal from judgment of the District Court for the Territory of Alaska, Third Division, denying petition for Writ of Habeas Corpus.

That on the 11th day of January, 1952, the above-entitled Court rendered its decision denying the petition for Writ of Habeas Corpus of Frank J. Kellner on the grounds that his trial was held on a legal day and that the sentence and commitment was correct and proper and in accordance with the Alaska statutes.

That the said Frank J. Kellner is now confined in the Federal Jail at Seward, Alaska, serving a

sentence of eight months imposed by the United States Commissioner at Naknek, Alaska, on a charge of Disorderly Conduct and Assault and Battery.

I, the above-named appellant, by and through my attorney, John D. Shaw, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated the 14th day of January, 1952.

/s/ JOHN D. SHAW,
Attorney for Frank J.
Kellner, Appellant.

[Endorsed]: Filed January 14, 1952.

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[Title of District Court and Cause.]

## ORDER TO EXTEND THE TIME FOR FILING AND DOCKETING RECORD ON APPEAL

This matter having come before the Court on the motion of John D. Shaw, Attorney for Frank J. Kellner, and it appearing that there is good cause for extending time for filing and docketing the record on appeal in the United States Court of Appeals for the Ninth Circuit, it is

Hereby Ordered that the time for extending and docketing the record on appeal in the above-

captioned case be extended from the 23rd day of February, 1952, to and including March 9, 1952.

Done this 20th day of February, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed February 20, 1952.

Entered February 20, 1952.

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[Title of District Court and Cause.]

## ORDER TO EXTEND THE TIME FOR FILING AND DOCKETING RECORD ON APPEAL

This matter having come before the Court on the motion of John D. Shaw, Attorney for Frank J. Kellner, and it appearing that there is good cause for extending time for filing and docketing the record on appeal in the United States Court of Appeals for the Ninth Circuit, it is

Hereby Ordered that the time for extending and docketing the record on appeal in the above-captioned case be extended from the 9th day of March, 1952, to and including March 24, 1952.

Done this 7th day of March, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 7, 1952.

Entered March 7, 1952.

[Title of District Court and Cause.]

## STIPULATION

It is hereby stipulated by and between John D. Shaw, Attorney for appellant in the above-entitled case, and J. Earl Cooper, United States Attorney, the Attorney for the government, that certified copies of the transcript of record be dispensed with and that the original file in the above-entitled case be sent to the Ninth Circuit Court of Appeals for the purpose of appeal in the above-entitled case.

Witness our hands this 19th day of March, 1952.

/s/ JOHN D. SHAW.

/s/ J. EARL COOPER,
United States Attorney.

[Endorsed]: Filed March 19, 1952.

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with

the above-entitled action or proceeding, and including specifically the Petition for Writ of Habeas Corpus, Order for Writ to Issue, Writ of Habeas Corpus, Transcript of Oral Decision of the Court, Notice of Appeal, Order to Extend Time for Filing and Docketing Record on Appeal, Second Order to Extend Time for Filing and Docketing Record on Appeal, Stipulation and Designation of Record.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of Alaska, Third Division.

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[Endorsed]: No. 13309. United States Court of Appeals for the Ninth Circuit. In the Matter of the Petition of Frank J. Kellner, for a Writ of Habeas Corpus, Frank J. Kellner, Appellant. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed March 21, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13309

In the Matter of:
THE PETITION OF FRANK J. KELLNER, FOR A WRIT OF HABEAS CORPUS

## APPELLANT'S STATEMENT OF POINTS ON WHICH HE INTENDS TO RELY

For the purposes of this appeal, appellant intends to proceed on the bare question of law involved only, i.e.:

(1) Is it within the jurisdiction of, and does a United States Commissioner and ex-officio Justice of the Peace in Alaska have the authority to impose successive or consecutive sentences?

(2) Do two or more sentences, on separate charges, imposed simultaneously by a United States Commissioner and ex-officio Justice of the Peace in Alaska, run concurrently in the absence of specification as to which of said sentences is to be first served?

(3) If the Honorable Court should answer (1) and (2) above in the affirmative, then was a proper specification made of the order in which the sentences were to be served in the case at bar?

/s/ JOHN D. SHAW,
Attorney for Appellant.

Affidavit of Service attached.

[Endorsed]: Filed March 28, 1952.

In the District Court for the Territory of Alaska
Division Number Three at Anchorage

No. 7424

In the Matter of:

The Imprisonment of FRANK J. KELLNER.

## JUDGMENT

This matter having come on for hearing before the District Court for the District of Alaska, Division Number Three at Anchorage, Honorable Anthony J. Dimond, District Judge, the petitioner being represented by John D. Shaw, Esquire, and the United States of America being represented by J. Earl Cooper, Esquire, United States Attorney. The Court hearing the evidence of the petitioner and his witnesses and the witnesses for the government, and having received into evidence the records of the United States Commissioner for the Naknek Precinct, Third Division, Territory of Alaska, and having heard the arguments of counsel, respectively, and being fully advised in the matter, doth hereby:

Order, Adjudge and Decree that the petitioner, Frank J. Kellner, was regularly and lawfully convicted after trial in the United States Commissioners Court for the Naknek Precinct, Third Division, Territory of Alaska on the charge of Assault and Battery and Drunk and Disorderly; that said trial was held on Monday, July 30, 1951, a legal day and that the sentence of the Court was for 280 days, a

legal sentence under the laws of the Territory of Alaska, and a sentence within the jurisdiction of the United States Commissioner and Ex-officio Justice of the Peace for the Naknek Precinct, and it is further:

Ordered, Adjudged and Decreed that the petitioner, Frank J. Kellner be remanded to the custody of the United States Marshal to serve out the remainder of said sentence.

Done and ordered entered at Anchorage, Alaska, March 3rd, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed and entered March 3, 1953.

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United States Court of Appeals
for the Ninth Circuit

No. 13309

In the Matter of:

FRANK J. KELLNER, etc.

United States of America, ss:

MANDATE

The President of the United States of America.

To the Honorable, the Judges of the District Court for the Territory of Alaska, Third Division Greeting:

Whereas, lately in the District Court for the

Territory of Alaska, Third Division, before you or some of you, the Matter of Frank J. Kellner, No. AO7424, an Order was entered on the 11th day of January, 1952; which said Order is of record in said matter in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said Frank J. Kellner, appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 22nd day of January, in the year of our Lord, one thousand nine hundred and fifty-three, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this court that the appeal in this cause be, and hereby is dismissed, February 3, 1953.

You, Therefore, are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the ninth day of March in the year of our Lord one thousand nine hundred and fifty-three.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth Circuit.

Entered March 27, 1953.

[Endorsed]: Filed March 31, 1953.

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In the District Court for the Territory of Alaska
Division Number Three at Anchorage

No. A-7424

In the Matter of:

The Petition of FRANK J. KELLNER, for a Writ of Habeas Corpus.

NOTICE OF APPEAL

Notice is hereby given that the petitioner in the above-entitled cause does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment stated herein below.

This is an appeal from the judgment of the District Court for the Territory of Alaska, Third Division, denying petition for Writ of Habeas Corpus.

On the 11th day of January, 1952, the above-entitled court rendered its decision denying the

petition for Writ of Habeas Corpus of Frank J. Kellner, said court finding that petitioners trial before the U. S. Commissioner and Ex-officio Justice of the Peace for the Naknek Precinct was held on a legal day and that the sentence and commitment was correct and proper and in accordance with the Alaska statutes.

On the 3rd day of March, 1953, judgment in the above-entitled cause was entered and filed.

The said Frank J. Kellner is now at liberty on bail.

The above-named appellant by and through his attorney, John D. Shaw, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated the 16th day of March, 1953.

/s/ JOHN D. SHAW,
Attorney for Frank J.
Kellner, Appellant.

[Endorsed]: Filed March 16, 1953, D.C.

[Endorsed]: Filed March 19, 1953, U.S.C.A.

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[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between John D. Shaw, attorney for appellant in the above-entitled case, and Seaborn J. Buckalew, United States at-

torney for the Third Division, District of Alaska, that the record in said case now on file with the United States Court of Appeals for the Ninth Circuit may be considered by said court in connection with the second appeal in said case, and further if said court consents, then the briefs for appellant and appellee now on file may be considered for the purpose of hearing said second appeal.

Dated this 16th day of March, 1953.

/s/ JOHN D. SHAW,
Attorney for Appellant.

SEABORN J . BUCKALEW,
United States Attorney for the Third Division, District of Alaska.

[Endorsed]: Filed May 22, 1953.

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[Endorsed]: No. 13876. United States Court of Appeals for the Ninth Circuit. In the Matter of the Imprisonment of Frank J. Kellner, Frank J. Kellner, Appellant. Transcript of Record. Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed June 17, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.